

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA

13-CR-607 (JFB)

-against- :

United States Courthouse
Central Islip, New York

PHILLIP A. KENNER,
a/k/a "Philip Kenner"
and

TOMMY C. CONSTANTINE,
a/k/a "Tommy C. Hormovitis,

TRANSCRIPT OF TRIAL

Defendants. : May 4, 2015
9:50 a.m.

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BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE, and a jury

APPEARANCES:

For the Government:

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United States Attorney
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Central Islip, New York 11722
BY: JAMES M. MISKIEWICZ
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For the Defendant:
Kenner:

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For the Defendant
Constantine:

BY: ROBERT LARUSSO, ESQ.
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Proceedings recorded by mechanical stenography.
Transcript produced by computer.

1 (Trial commences.)

2 THE COURT: All right.

3 So we are still waiting for two jurors who I'm
4 not sure why they are not here yet. We tried to reach out
5 to them and they didn't have a response. Hopefully they
6 will arrive shortly. I think we have some issues to
7 address while we are waiting.

8 First, I want to make sure you have had a chance
9 to review my preliminary instructions that I'm going to
10 read this morning. Are there any objections to that from
11 the government?

12 MR. MISKIEWICZ: No, your Honor.

13 THE COURT: From the defense?

14 MR. LARUSSO: No, your Honor.

15 MR. HALEY: No, sir.

16 THE COURT: The second item on my agenda is, I
17 did receive a sealed letter from the government regarding
18 a voice mail that was erroneously left by Mr. Haley on
19 Mr. Miskiewicz's machine.

20 I don't know if there are any issues we need to
21 discuss with respect to that. Are there any issues on
22 that, Mr. Haley?

23 MR. HALEY: Your Honor, apart from the slight
24 bit of embarrassment, my faux pas, I did discuss with my
25 client the content of that recording. I played it for him

1 this morning.

2 And I believe he wishes me to continue
3 representing him in this matter.

4 THE COURT: Okay.

5 Is that correct, Mr. Kenner?

6 DEFENDANT KENNER: Yes, your Honor.

7 THE COURT: Does the government have any issues
8 with that?

9 MR. MISKIEWICZ: No, your Honor.

10 THE COURT: So I'll place that letter under
11 seal.

12 With respect to sidebars, Mr. Constantine and
13 Mr. Kenner, I want to emphasize what I said during jury
14 selection, if at any point you wish to be present during a
15 sidebar, just let your attorneys know and I'll make
16 arrangements to have you present.

17 You understand that, Mr. Constantine?

18 DEFENDANT CONSTANTINE: Yes, your Honor.

19 THE COURT: Mr. Kenner?

20 DEFENDANT KENNER: Yes, your Honor.

21 THE COURT: Are there any issues the government
22 wants to address this morning?

23 MR. MISKIEWICZ: A couple, your Honor.

24 I have one issue of an evidentiary kind which
25 I'd like to just raise so that we can kind of avoid a lot

1 of downtime with the jury in the box.

2 I anticipate a potential line of impeachment of
3 two witnesses that we'll be calling early in the case,
4 Michael Peca and Bryan Berard on allegations that both
5 were the subject of IRS as well as Canadian revenue agent
6 tax audits. We have recently located -- both of those
7 were instigated by, we know, anonymous, quote-unquote,
8 tips to those agencies.

9 They resulted in no tax deficiencies being
10 found. In fact, Mr. Peca will say that after four years
11 of being audited by the IRS and sustaining a lot of
12 personal expense, he ended up getting money back. We have
13 located an anonymous letter from the defendant to Canadian
14 revenue agents.

15 THE COURT: Which defendant?

16 MR. MISKIEWICZ: I'm sorry, the defendant
17 Mr. Kenner, on his laptop attempting to instigate an audit
18 of Mr. Berard, who would also similarly say, yes, he was
19 the subject of an audit.

20 It resulted in no penalties or tax deficiencies.
21 Similarly he ended up being contacted by the DEA who said
22 they received an anonymous tip about his narcotics
23 trafficking, also a false allegation which we believe was
24 instigated by the defendant.

25 Since there is no valid basis for impeachment,

1 no reason to suggest that these individuals did anything
2 wrong, or curried favor with the government, we would ask
3 that any questions along those lines be precluded in the
4 defendant Kenner's cross-examination of both of those
5 witnesses.

6 THE COURT: Mr. Haley, do you intend to inquire
7 about those tax audits?

8 MR. HALEY: The answer is no, Judge, and I have
9 never had an intention to make that type of inquiry.

10 So I think that issue is easily resolved.

11 THE COURT: Good.

12 The same thing, Mr. LaRusso?

13 MR. LARUSSO: Your Honor, Mr. Miskiewicz was
14 kind enough to apprise me of this information before you
15 came out.

16 I have had an opportunity just very briefly to
17 discuss with my client, very, very briefly in these notes
18 and I thought through it as little as I can. I'll be
19 candid with the court, Judge, I need to look at the
20 evidence because it dovetails into our defense. The fact
21 that Mr. Kenner is making these false allegations, he does
22 the same to Mr. Constantine. We were hoping to prevent
23 that from coming out.

24 But if I have evidence that's just been
25 presented to me that Mr. Kenner has been making false

1 accusations regarding several witnesses, it may be
2 significant to my client to let it be known to the jury
3 that he likewise was accused by Kenner of similar
4 misappropriations. You are going to hear that during
5 trial, Judge. It's not going to be something that will be
6 withheld to the jury.

7 We will actually bring out that Mr. Kenner was
8 accusing Mr. Constantine and I think Mr. Haley will agree
9 that's part of his consequence, that my client was this
10 sole person responsible for the money and the
11 disbursements and after the money had been taken allegedly
12 misappropriated, Mr. Kenner initiates an attack on my
13 client.

14 Well, Judge, this evidence is very helpful,
15 very, very on point. I didn't have such evidence before
16 today that he does make up allegations to the point where
17 he harms individuals and we have the harm to these two
18 hockey players and our defense is my client's been harmed
19 likewise. I apologize to the court, but I can't
20 articulate more than that because I haven't seen the
21 evidence and I'll ask for an opportunity to review it if I
22 can possibly do so.

23 THE COURT: When you say the evidence, you mean
24 the letters that were written?

25 MR. LARUSSO: Yes, so I can see the strength of

1 the evidence.

2 It may not be that strong. I don't know, Judge.

3 THE COURT: Why don't we do this, then,
4 obviously there should be no reference to that in the
5 opening statements and how quick are those witnesses, are
6 they today?

7 MR. MISKIEWICZ: Mr. Peca will be on today, yes.
8 He's not the first witness, though.

9 THE COURT: Okay.

10 I think we'll have time, if you can just direct
11 Mr. LaRusso to the particular letters so he can review
12 them.

13 MR. MISKIEWICZ: Will do.

14 THE COURT: All right.

15 MR. HALEY: Your Honor --

16 MR. LARUSSO: I'm sorry, Mr. Haley, may I finish
17 my remarks? I apologize.

18 Your Honor, it may also be helpful to me in
19 terms of organization, Mr. Juneau I believe is the first
20 witness up, probably will take a good part of the day.
21 Before we begin with Mr. Peca, may I have that opportunity
22 to spend a little more time before he's called to the
23 stand?

24 That gives me a few hours not only to do that,
25 but also do all the other trial work that needs to be done

1 to get ready for the trial for the next day. That would
2 be my request to the court.

3 THE COURT: I want to see how long that first
4 witness takes, but I don't believe -- I won't let you
5 cross Mr. Peca until you have had at least overnight to
6 figure out if there is the ability to -- or I'll allow
7 cross-examination on this if you want to do that.

8 But I don't want to end at 2 o'clock today if
9 the witness is very quick. I don't know how long that
10 first witness is.

11 MR. MISKIEWICZ: I would estimate Mr. Peca to be
12 about an hour on direct.

13 THE COURT: We won't have the cross of the
14 second witness.

15 MR. LARUSSO: I'm sure Mr. Miskiewicz will help
16 me evaluate the evidence so we won't delay the proceedings
17 unnecessarily.

18 THE COURT: All right.

19 Mr. Haley, the jurors are all here, so I do want
20 to get started.

21 MR. HALEY: Yes, sir.

22 For purposes of the record, the letter in
23 question was written in good faith based upon information
24 available to my client that led him to believe in good
25 faith that that's what had been admitted. I do not intend

1 on cross-examining the witness, as I testified previously.

2 Judge, there is another housekeeping matter. It
3 involves the subpoena with reference to the Northern Trust
4 bank records. The signed by your Honor was returnable
5 actually on Friday. My office did not receive the records
6 and I think I know what may have occurred and it's no
7 one's fault.

8 In previous instances where I submitted a
9 subpoena to the court, and I'm CJA counsel, my experience
10 has been the court would sign the subpoena and the
11 subpoena would be delivered by the clerk to the marshal
12 service. I'm CJA counsel. The marshal service, as much
13 as I'd like to think they like me, will not necessarily
14 take anything from me for service.

15 What may have happened, Judge, I don't know if
16 this is the case, perhaps the subpoena was signed by your
17 Honor, a week or so ago, and perhaps it wasn't given to
18 the marshal service for service.

19 THE COURT: We got a call from the marshal
20 service in Chicago on Friday, I think.

21 It was served by the marshals on Wednesday.

22 MR. HALEY: Thank you.

23 But returnable on Friday, I haven't received
24 those records as yet. I don't know if they were delivered
25 to the clerk's office.

1 THE COURT: We'll check.

2 MR. HALEY: Thank you, sir.

3 THE COURT: All right.

4 We are ready for the opening statements?

5 MR. LARUSSO: Your Honor, it won't take that
6 long, but one other matter and I apologize to the court.

7 The last time we were before you we talked about
8 Mr. Constantine's alias and the relevancy of the
9 government's offer regarding one of the press releases. I
10 would like to be able to just put on the record, it's
11 going to take a little longer than I'm sure the court
12 would like, whether we take about ten minutes to lay out
13 our arguments, but we have copies and e-mails that I think
14 will show the court that all of the individuals who
15 donated or contributed to the Global Settlement Fund were
16 well aware of the media aspect of the moneys that were
17 being spent and these e-mails clearly show that all of
18 them were well aware of what was happening, that they were
19 apprized of articles being done.

20 I think it undercuts the government's need to
21 use this particular one which comes very late in the
22 process, Judge. I think the e-mail they referred to is a
23 November 2009, e-mail, I have a whole bunch of e-mails,
24 Judge, going back and forth between Mr. Constantine and
25 the hockey players, very clearly describing what the

1 nature of the media was in relation to the Global
2 Settlement Fund. I'm not asking the court to rule on it.

3 I'm asking the court permission to put my
4 argument on the record when we take a break and I ask the
5 court to look at these e-mails. I'll give a copy to the
6 government and to the court and Mr. Haley.

7 THE COURT: That's fine.

8 We'll go over that at some point later today.

9 MR. MISKIEWICZ: Your Honor, in that regard,
10 whenever the court is ready, this relates back to the
11 Tommy Hormovitis and prior conviction.

12 Mr. Peca is one of those witnesses who heard
13 Mr. Constantine refer to himself as having a prior
14 conviction and turning his life around. Whenever the
15 court is ready to make a determination on that, if I can
16 have sometime to remind or instruct the witness as to
17 whether or not he will be permitted to make reference to
18 that, I'd appreciate that time.

19 THE COURT: Yes.

20 I will place that on the record once we complete
21 the opening statements.

22 MR. MISKIEWICZ: Thank you.

23 THE COURT: How long do you think your opening's
24 going to be?

25 MS. KOMATIREDDY: Approximately 15 to 20

1 minutes, your Honor.

2 MR. LARUSSO: Your Honor, mine's going to be
3 about a half hour to 40 minutes.

4 MR. HALEY: I'm going to break my own rule,
5 Judge.

6 Mine will be in excess of 30 minutes, perhaps 40
7 minutes as well.

8 THE COURT: Okay.

9 MR. HALEY: Your Honor, May I step out into the
10 hall for a moment?

11 THE COURT: Sure.

12 MR. HALEY: Thank you.

13 (There was a pause in the proceedings.)

14 MR. LARUSSO: Your Honor, I apologize. I should
15 have done this before.

16 The original indictment contains approximately
17 19 hockey players as victims of the fraud and the
18 government over time brought superseding indictments
19 taking some of those hockey players out.

20 It occurred to me, and I should have brought
21 this up, some of the hockey players may be here today or I
22 was told they may come. There is a chance we may be
23 calling them on our own case. I don't want them to be
24 prejudiced by either the openings or any of the testimony.

25 Can I ask the court, I'll do it, if there are

1 any of the hockey players considering themselves a victim
2 of the case, if they are here I will ask they been
3 excused.

4 THE COURT: Mr. Miskiewicz?

5 MR. MISKIEWICZ: I don't believe there are, no.

6 I think everybody else who is here is either law
7 enforcement related or an intern from St. John's that
8 works in the US Attorney's Office.

9 THE COURT: Let me just ask, are there any
10 alleged victims sitting in the gallery?

11 MR. LARUSSO: One man is shaking his head in the
12 back, your Honor.

13 THE COURT: Can you find out who that is.

14 MR. MISKIEWICZ: It's Mr. Rizzi.

15 He invested in Eufora, but was not referenced in
16 the indictment.

17 THE COURT: You have no intention of calling
18 him?

19 MR. MISKIEWICZ: We have no intention of calling
20 him.

21 MR. LARUSSO: Your Honor, Mr. Rizzi is one of
22 the two investors that were -- that consulted with
23 Mr. Kaiser and as a result of his conversations, Mr. Rizzi
24 gave money to Mr. Kaiser which was then in December of
25 2009 sent to Eufora as an investment.

1 The government in their indictment is only
2 talking about a different investor who gave money to
3 Mr. Kaiser himself, Mr. Privitello. Mr. Rizzi was
4 actually a plaintiff in a suit against Mr. Constantine
5 and, Judge, he may be a witness in this case. He is so
6 intimately involved in the matter being exposed, I really
7 don't think he should be sitting in the court. I
8 apologize to him. I wish I knew in advance. I would have
9 discussed it with him.

10 But I have to be on the base of caution, Judge,
11 if something comes up I may have to call him as a witness
12 in my case and I'll tell you why. They have not alleged
13 that Mr. Kaiser who put \$200,000 in the same time
14 Mr. Privitello, who is a victim of this particular fraud,
15 the moneys Mr. Kaiser put in allegedly brought to
16 Mr. Rizzi and another police officer by the name of
17 Mr. Hughes, why that's not part of the fraud it will be
18 part of my case.

19 THE COURT: You don't need to tell me any more.

20 Mr. Rizzi, I'll ask that you leave the
21 courtroom. Anyone who is a potential witness can't sit in
22 the courtroom and hear the testimony. I apologize. If we
23 knew in advance, we would have notified you, so you
24 wouldn't have to come here for no reason, but I'll have to
25 ask you to leave.

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1 Thank you.

2 MR. HALEY: Your Honor, for purposes of the
3 record that's a joint application.

4 THE COURT: All right.

5 Let's bring in the jury.

6 (Jury enters the courtroom.)

7

8 THE COURT: Everyone can be seated.

9 Good morning, members of the jury. It's good to
10 see you all this morning. Welcome back. We are ready to
11 begin the trial.

12 The first order of business is for you to take
13 the oath as jurors in this case. I'll ask that you all
14 please stand and raise your right hand.

15 (Jury sworn.)

16 THE COURT: You can be seated.

17 Members of the jury, now that you have been
18 sworn, I will give you some preliminary instructions to
19 guide you in your participation in the trial. This should
20 take about ten minutes or so. My full instructions to you
21 will be at the end of the case before you begin your
22 deliberations, but these are some preliminary instructions
23 that will help guide you as jurors as you hear the
24 evidence. Some of the things that I'm saying to you this
25 morning I said to you last week before you left, but I'm

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1 going to repeat them because they are all very important
2 instructions.

3 To begin with, you are here to administer
4 justice in this case, according to the law and the
5 evidence. You are to perform this task with complete
6 fairness and impartiality, and without bias, prejudice or
7 sympathy for or against the government or the defendants.
8 It will be your duty to find from the evidence what the
9 facts are. You and you alone will be the judges of the
10 facts.

11 You will then have to apply to those facts the
12 law as the court will give it to you. You must follow
13 that law, whether you agree with it or not. Nothing that
14 I may say or do during the course of the trial is intended
15 to indicate, or should be taken by you as indicating, what
16 your verdict should be. That is entirely up to you.

17 The evidence from which you will find the facts
18 will consist of the testimony of witnesses, documents and
19 other things received in the record as exhibits, and any
20 facts that the lawyers agree to or stipulate to, or that
21 the court may instruct you to find.

22 Certain things are not evidence. I will list
23 them for you now. These things are not evidence:

24 1. Statements, arguments and questions by
25 lawyers are not evidence.

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1 2. Objections to questions are not evidence.

2 Lawyers have an obligation to their clients to make
3 objections when they believe evidence being offered is
4 improper under the rules of evidence. You should not be
5 influenced by the court's ruling on it.

6 If the objection is sustained, then you ignore
7 the question.

8 If it is overruled, you treat the answer to the
9 question like any other answer.

10 If you are instructed that some item of evidence
11 is received for a limited purpose only, you must follow
12 that instruction.

13 3. Testimony that the court excludes or tells
14 you to disregard is not evidence and must not be
15 considered.

16 4. Anything you see or hear outside the
17 courtroom is not evidence, and must be disregarded. You
18 are to decide the case solely on the evidence presented
19 here in the courtroom.

20 Now, there are two kinds of evidence, direct and
21 circumstantial. Direct evidence is direct proof of a fact
22 such as testimony of an eyewitness.

23 Circumstantial evidence is proof of facts from
24 which you may infer or conclude that other facts exist. I
25 will give you further instructions on these, as well as

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1 other matters, at the end of the case, but keep in mind
2 that you may consider both kinds of evidence, direct and
3 circumstantial.

4 It will be up to you to decide which witnesses
5 to believe, which witnesses not to believe, and how much
6 of any witness's testimony to accept or reject. I will
7 give you some guidelines for determining the credibility
8 of witnesses at the end of the case.

9 Now, as you know, this is a criminal case.
10 There are three basic rules about a criminal case that you
11 must keep in mind.

12 First, the defendants are presumed innocent
13 until proven guilty. The indictment against the
14 defendants brought by the government is only an
15 accusation, nothing more. It is not proof of guilt or
16 anything else. The defendants, therefore, start out with
17 a clean slate.

18 Second, the burden of proof is on the government
19 at all times. The defendants have no burden to prove
20 their innocence or to present any evidence or to testify.
21 Since the defendants have the right to remain silent, the
22 law prohibits you from arriving at your verdict by
23 considering that the defendants may not have testified.

24 Third, the government must prove the defendants'
25 guilt beyond a reasonable doubt. I will give you further

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1 instructions on this point, again, at the end of the case.

2 Now a few words about your conduct as jurors.

3 First, I instruct you that during the trial you
4 are not to discuss this case among yourselves or with
5 anyone else, including during any recesses or breaks.
6 Even as among yourselves, you see, it is important that
7 each of you keep an open mind until you have heard all the
8 evidence, the attorneys' summations and my instructions on
9 the law. Only then will you begin to exchange views among
10 yourselves and reach your verdict.

11 But until I tell you to actually begin
12 deliberating, which will be at the end of my instructions
13 on the law at the end of the case, please do not discuss
14 the case at all, among yourselves, with family members, or
15 with anyone else. As I said last Monday, that includes
16 social media, no communication of any type, electronic or
17 otherwise.

18 Second, do not permit any other person to
19 discuss the case in your presence. If someone does so,
20 despite your telling him or her not to, report that fact
21 to me. Please do not, however, discuss with your fellow
22 jurors either that fact or any other fact that you feel
23 necessary to bring to my attention. The reason is
24 obvious. If something occurs that affects the ability of
25 a juror to continue to serve fairly and impartially and

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1 that juror communicates it to fellow jurors, more than one
2 of you may be affected.

3 Third, please do not, while you are serving as
4 jurors in this case, have any conversations with the
5 parties, the attorneys or any witnesses in this case,
6 whether in the courtroom, in the hallways, in the
7 elevator, outside or anywhere else. By this I mean not
8 only to avoid talking about the case, do not talk at all,
9 even to say good morning, or acknowledge any of these
10 people. Someone seeing a juror in conversation with a
11 party, lawyer, or witness, might think that something
12 improper was being discussed. To avoid even the
13 appearance of impropriety, then, have no conversations or
14 acknowledgments, even a good morning, none whatsoever.

15 The lawyers, as officers of the court, are
16 particularly sensitive to this. So I can tell you that
17 when they pass you in the halls without even acknowledging
18 your presence, they do not mean to be rude. They are
19 simply following my instruction and you must follow that
20 instruction as well.

21 Fourth, do not read or listen to anything
22 touching on this case in any way. Again, I want to remind
23 you what I said last week, for the entire trial I do not
24 want you to read Newsday. I do not want you to read the
25 Daily News. I do not want you to read the New York Post

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1 and I don't want you to watch News 12, and obviously if
2 you are watching any other news show or TV or listening to
3 the radio or reading any other newspapers or periodical
4 and you hear anything related to this case, you should
5 immediately turn it off, the TV or the radio, and if you
6 are reading something and you see something, a headline
7 that pertains to the case you should immediately turn the
8 page and not read it. It's very important.

9 Fifth, do not try to do any research or make any
10 investigation about the case on your own. Again, as I
11 said Monday, that would include any internet research, any
12 Googling of any subject matter involving the case or the
13 participants involved in the case, no outside research of
14 any kind is permitted.

15 Finally, do not form any opinion until all the
16 evidence is in. Keep an open mind until you start your
17 deliberations at the end of the case. Sometimes jurors
18 ask if they can take notes, and each of you have been
19 provided with a little notepad if you want to use it to
20 take notes. I have no view of whether jurors should take
21 notes. That's up to the individual juror. But I do have
22 some instructions for those of you who do takes notes.

23 If you take notes, you should leave them in the
24 jury room when you leave at night. Don't take them home.
25 They will be here in the morning when you come back. I

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1 also want you to remember that they are for your own
2 personal use. Also, the notes are simply to help your
3 memory. I don't want you to place too much emphasis on
4 juror notes. As you know, a person's notes could be
5 wrong. At the conclusion of the case when you are
6 deliberating, notes which any juror may take may not be
7 given any greater weight or influence in the determination
8 of the case than the recollection or impression of other
9 jurors, whether from notes or memory with respect to the
10 evidence presented or what conclusions, if any, should be
11 drawn from such evidence.

12 When you deliberate at the end of the case, any
13 difference between a juror's recollection and another
14 juror's notes should be settled by asking that the court
15 reporter read back the transcript of that testimony, for
16 it is the court record, rather than any juror's notes,
17 upon which the jury must base its determination of the
18 facts and its verdict. You can see we have the court
19 reporter here who's writing down every word that's being
20 said and at the end of the case you can have a readback of
21 any testimony that you wish.

22 Also, any exhibit that is received into the
23 record as evidence during the trial you can request to
24 have that during your deliberations as well, so if the
25 lawyers introduce an exhibit and they don't immediately

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1 show it to you, it's still going to be available to you
2 during your deliberations.

3 The trial will now begin. I want to discuss the
4 order of the trial.

5 First, the government will make an opening
6 statement, which is simply an outline to help you
7 understand the evidence as it comes in.

8 Next, the defendants' attorneys may, but do not
9 have to, make an opening statement. Opening statements
10 are not evidence. Rather, you may consider the opening
11 statements as a preview of what each side expects the
12 evidence in this case will show.

13 The government will then present its evidence
14 including testimony from witnesses, counsel for the
15 defendants may, if they wish, cross-examine these
16 witnesses. Evidence may also be in the form of physical
17 items, exhibits which are offered in evidence.

18 Following the government's case, the defendants
19 may, if they wish, present evidence, but neither of the
20 defendants is required to do so. The burden is always on
21 the government to prove every element of the offense
22 charged beyond a reasonable doubt. The law never imposes
23 on a defendant in a criminal case, the burden of calling
24 any witnesses or introducing any evidence. If the
25 defendant's put on any evidence, the government may or may

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1 not wish to put further evidence before you to rebut what
2 the defense has set forth.

3 After all the evidence has been presented, the
4 attorneys will have the opportunity to present a closing
5 argument or a summation to you. What is said in these
6 arguments is not evidence. Each party is simply
7 presenting to you their view of what the evidence has
8 shown, and suggesting to you the inferences or conclusions
9 you should draw from the evidence. You may find an
10 argument sound and persuasive, or you may not.

11 Because the government has the burden of proof
12 in the case, it has the right to argue first in the
13 closing argument, followed by counsel for each of the
14 defendants, after which the government may give a short
15 rebuttal summation. After you have heard the closing
16 arguments, I will instruct you on the applicable law. You
17 will then retire to the jury room to deliberate on your
18 verdict.

19 You have a tremendously important task as
20 jurors, it is to determine the facts. Our constitution
21 gives a defendant a right to have you, who are members of
22 the community, find those facts. You and not the court
23 are the sole judge of the facts.

24 Let me say to the alternate jurors that you
25 should listen just as carefully and as conscientiously as

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1 the other jurors. You may very well be called upon prior
2 to the conclusion of the case to take the place of one of
3 the jurors and then you are to render a verdict. So pay
4 close attention at all times.

5 That ends my preliminary instructions. Just let
6 me discuss scheduling with you so you understand how the
7 trial day works. We begin at 9:30 each morning. Again, I
8 would just urge each of you to try to get here promptly so
9 we begin at 9:30, otherwise we have to wait. If one
10 juror's late, everybody has to wait for that one juror, so
11 please be on time.

12 Halfway through the morning, usually around 11
13 o'clock or so, we'll take a 15 or 20-minute break and then
14 we go to the lunch break which is usually between 12:30
15 and 1 and it depends on other matters I have during the
16 lunch break, so depending on when those are scheduled and
17 how long they are you will receive either an hour or an
18 hour and 15 minutes for lunch, so that will be sometime
19 between 12:30 and 1, and the afternoon we take a
20 mid-afternoon break around 3 o'clock or so and we go until
21 4:30.

22 I know many of you have buses or trains you have
23 to catch, so we'll end promptly at 4:30 unless there is
24 some issue with a witness like there are two minutes left
25 and that witness can't come back, other than that we will

Opening - Ms. Komatireddy

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1 end promptly. So that's the schedule we will follow.

2 We are ready to begin now with the opening
3 statements starting with the attorney for the government.

4 Go ahead.

5 MS. KOMATIREDDY: Michael Peca was just 17 when
6 he joined the National Hockey League.

7 Growing up, he didn't have much. He came from a
8 rough neighborhood, a rough town, and hockey was his way
9 out. So when all the other guys went to their
10 professional gyms and hired their professional trainers,
11 Michael went to the school yard, found an old tire, tied
12 it to his waist and ran, and worked, and at 17 he realized
13 his lifetime dream, when he got drafted by a professional
14 hockey team in the NHL.

15 With that success came money, and even at 17
16 Michael knew that he had to save that money, because
17 hockey is not a lifetime guarantee. It only lasts as long
18 as you can last in a violent sport. So Michael looked for
19 help. He looked for someone who could do what he didn't
20 know how to, invest that money and keep it safe for the
21 future.

22 That's when the defendant, Phil Kenner, came
23 knocking on Michael's door. Kenner came into Michael's
24 home, sat down with Michael in his living room and he said
25 all the right things. Kenner came recommended from

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1 Michael's agent. Kenner told Michael that he was a former
2 hockey player, and now he was a professional investment
3 advisor, who advised and managed the money of famous
4 professional hockey players, people that Michael admired.
5 Kenner even brought one of those professional hockey
6 players with him to tell Michael that Kenner, unlike
7 others, could be trusted.

8 So Kenner got Michael's trust, and Kenner got
9 Michael's money, and then Kenner, with his accomplice,
10 Tommy Constantine, an opportunist who liked to hobnob with
11 the rich and famous, systematically stole more than
12 \$10 million from Michael and multiple other investors.

13 The basic fraud was simple. The defendants told
14 investors they would put their money in one place.
15 Instead, they put it in another. The defendants told
16 investors they would put their money in a real estate
17 development project in Hawaii. Instead, they put it in
18 their personal bank accounts.

19 The defendants told investors they would put
20 their money in a promising new company called Eufora.
21 Instead, they put it in their personal bank accounts. The
22 defendants told investors they would put their money in a
23 legal defense fund to pay an attorney to sue some other
24 guy who had stolen from them. Instead, they put that
25 money in their personal bank accounts.

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1 That's why we are here today.

2 Good morning. My name is Saritha Komatireddy.

3 I'm an Assistant United States Attorney here on
4 Long Island. With me is assistant US Attorney Jim
5 Miskiewicz and the investigators in this case, Special
6 Agent Matt Galioto of the FBI and Special Agent Josh Wayne
7 of the IRS. Together we represent the United States, and
8 it's our responsibility to present to you the evidence in
9 this case.

10 Here's what the evidence will show. Kenner was
11 the front man. When he met the players, he held himself
12 out to be a professional financial advisor. He had gone
13 through training, taken a series of exams and was licensed
14 as a financial advisor and took a regular fee for his
15 work. Constantine was Kenner's undisclosed partner, a
16 businessman in his own right who dabbled in different
17 businesses, some successful, some failures, some, you will
18 see, created solely for his personal benefit.

19 Now, when Kenner started investing the players'
20 money, he started out by putting their money in
21 conservative investments, stocks, bonds, mutual funds,
22 things that brought back a stable return, and in that way,
23 over years, he built up trust.

24 Then, Kenner and Constantine decided to exploit
25 that trust. The fraud had four parts. First was the

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1 setup, the part where the defendants took control of the
2 players' money and began stealing it. This is the Hawaii
3 firm. After years of putting the defendants' money in
4 conservative investments, Kenner pitched to the players a
5 new kind of investment, a real estate development project
6 in Hawaii. Kenner told the players that if they gave
7 their money, it would be used to buy land in Hawaii,
8 develop that land, and then sell it for a profit, which
9 would go back to the players.

10 But to get in on the deal, the players had to
11 take their money out of the bank that they knew and put it
12 in a new bank where Kenner could have full access to that
13 money and the ability to control it and move it around
14 without the players' knowledge. Trusting their financial
15 advisor, the players agreed to move their money, millions
16 of dollars, to this new bank. Once Kenner had that access
17 and control to the players' money, Kenner and Constantine
18 began stealing it.

19 Kenner cycled the money through several accounts
20 back to Constantine's bank account, where he used it for
21 himself, and then Kenner was a little bit more creative
22 about how he got the money back to himself. Remember the
23 money was supposed to be used to buy land in Hawaii,
24 develop it and sell it for a profit that went back to the
25 players? Well, Kenner bought land in Hawaii, sold it,

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1 took the profit for himself.

2 But that wasn't enough. Kenner decided to
3 commit a second fraud with the Hawaii accounts. This is
4 the Sag Harbor fraud, happens right here on Long Island.
5 Kenner arranges to buy a property in Sag Harbor, and he
6 tells an investor, a friend of his here on Long Island,
7 that if the investor puts up half the money, Kenner will
8 put up the other half, but Kenner doesn't put up any of
9 his own money.

10 He takes money, hundreds of thousands of dollars
11 from Michael's account at that new bank, the account that
12 was supposed to be used for Hawaii. Michael didn't give
13 Kenner permission. Michael didn't even know. He still
14 doesn't know.

15 But that still wasn't enough for these
16 defendants. Kenner and Constantine decided to steal from
17 their investors again. This time with a new scheme, the
18 Eufora scheme. This was the part when Constantine comes
19 out of the shadows and is introduced to the investors for
20 the first time.

21 Kenner and Constantine tell the investors,
22 Constantine has a company called Eufora. It's a company
23 that issues prepaid credit cards to people with bad
24 credit. Now, it's a promising new company, they say, with
25 promising new patents, and it just needs some money to get

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1 going, money to be used for business expenses,
2 advertising, legal fees.

3 So the investors give more than \$1 million,
4 which they are told will be used for Eufora, for those
5 business expenses, but Kenner and Constantine take that
6 money, and divert it back to themselves. This time not
7 little by little over time, they take all of it
8 immediately.

9 As time passes, the investors start to ask
10 questions and they are wondering where the money is going,
11 why they are not getting a return, and they start pointing
12 fingers at Kenner and Constantine. This is when the
13 defendants think up their final fraud, the cover-up, they
14 call it the Global Settlement Fund. This is the fraud
15 where the defendants lie to the investors about who's
16 stealing from them, and find a way to steal from them all
17 over again.

18 The defendants tell the investors that a guy in
19 Mexico named Ken Jowdy, stole their money and ran away
20 with it, and they tell investors that they are raising
21 money for a legal defense fund to pay an attorney to go
22 fight Jowdy. Thinking that this is the last hope to get
23 their money back, the investors give more than a million
24 dollars to the defendants, which they are told will be
25 used to fight Jowdy. But Kenner and Constantine take that

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1 money and divert it back to themselves and their own
2 personal projects.

3 For their actions, the defendants are charged
4 with multiple federal crimes, for lying to investors to
5 steal their money, the defendants are charged with wire
6 fraud. For being in on that fraud together, the
7 defendants are charged with conspiracy, and for moving
8 money around to conceal that fraud, the defendants are
9 charged with money laundering.

10 As the government, we have the burden of proving
11 the defendants guilty of those charges beyond a reasonable
12 doubt. We will meet that burden by presenting you with
13 evidence in the form of witness testimony, documents, bank
14 records and the defendants' own statements. You will hear
15 from the victims, Michael Peca, Joe Juneau, Bryan Berard,
16 and multiple other investors, people who were hockey stars
17 and in some cases even Olympians, but when they met
18 Kenner, they were just young men who had made it to the
19 NHL.

20 You will hear from them about what Kenner told
21 them, about where their money would go, and what it would
22 be used for. Then you will see the bank records that will
23 show you in black and white where the money actually did
24 go, and you will hear from some of the people in the
25 middle, people that will tell you that Kenner and

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1 Constantine told them to move money from one place to
2 another, and not ask any questions. Some of these people
3 will be testifying pursuant to an agreement with the
4 government, so you should scrutinize their testimony
5 carefully. But when you do, you will see that it is
6 consistent with all of the other evidence that is
7 presented to you.

8 Finally, you will hear from the defendants' own
9 statements in e-mails, text messages and recorded calls
10 where they direct money to themselves and lie about it,
11 and you will see where all of that money went, to funding
12 their own lavish lifestyle and their own personal hobbies.

13 Kenner used the victims' money to pay for the
14 mortgage on his million dollar home in Scottsdale,
15 Arizona, for beach-front property in California, and to
16 fund a tequila company he was starting in Mexico.

17 Constantine used the victims' money to put up a
18 show as a race car driver, to buy cars, get them upgraded,
19 fly around to races and hire playboy models to come to
20 those races with him.

21 And after you see all of this evidence, you will
22 be asked to return the only verdict that is consistent
23 with that evidence, a verdict of guilty on all counts.

24 THE COURT: Members of the jury, as I said
25 before, because the government has the burden of proof at

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1 all times, the lawyers for the defendants need not give an
2 opening statement at all.

3 However, I have been advised that each of them
4 wish to give an opening statement. I do want to instruct
5 you, this is very important, that obviously we have two
6 defendants who are on trial here, Mr. Constantine and
7 Mr. Kenner, and you need to consider them separately. The
8 government must meet its burden of proof as to each
9 defendant separately and, therefore, you need to consider
10 them separately in connection with the case.

11 So we will now hear defense counsel openings
12 starting with Mr. Haley for Mr. Kenner.

13 MR. HALEY: Thank you.

14 Power, a five-letter word that gives great
15 advantage to those who possess it and great disadvantage
16 to those who do not. The United States of America versus
17 Phillip Kenner, my client. The most powerful nation in
18 history with all of its resources, allied against one of
19 its citizens, and you will see those resources on full
20 display in this case.

21 You will hear that over a million documents were
22 acquired in connection with this investigation. You will
23 hear that the investigation by the FBI, and in that
24 respect, ladies and gentlemen, when I say the FBI, there
25 is a lead agent on the case, his name is Agent Galimoto,

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1 he's present in court, he has every right to be here, but
2 rather than continually use his name, I'm going to say FBI
3 because it's his investigation, he led this investigation
4 for the last at least six years. You will hear the
5 government with all its resources interviewed witnesses on
6 multiple occasions.

7 So, how do we level the playing field? Or, I
8 guess, Zamboni the ice, smooth it out, so that no side has
9 an advantage? Through you, the jury. You became and are
10 the most important people in this courtroom when you took
11 that oath a moment ago, and you will remain the most
12 important people in this courtroom to the point in time
13 you render your verdict.

14 For you, not the FBI, and not the office of the
15 United States Attorney, determine whether or not Phil
16 Kenner is a criminal, deserving of the consequences that
17 come with a criminal conviction. The government, having
18 just concluded their opening statement, I may have
19 disagreed with various representations made to you by the
20 government in terms of what the proof would show, or will
21 show, but they should have a full and fair opportunity in
22 their opening statement to say to you what they expect the
23 evidence to prove, and I know they will give me the same
24 courtesy, as I address you in terms of what I believe the
25 evidence will show.

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1 Your Honor told you this a moment ago, ladies
2 and gentlemen, what I say is not evidence. What the
3 government said is not evidence. The evidence will come
4 from the witnesses on the witness stand, whatever
5 documentary evidence is introduced, any number of things
6 of that nature.

7 But, what I'm telling you is what I expect the
8 evidence to show, and that is based upon matters that
9 preceded today in terms of the investigation that the
10 defense conducted as distinct from the investigation that
11 the government conducted. Your time is valuable, and I
12 usually do not speak more than 30 minutes in an opening
13 statement, but this unique case, ladies and gentlemen,
14 there are four separate allegations involving schemes to
15 defraud, and I'm going to beg your indulgence that you
16 stay with me as I try to address, or as I do address those
17 four separate alleged schemes to defraud.

18 It's a unique case also in this respect, ladies
19 and gentlemen. In terms of many of the facts in this case
20 there's not going to be any dispute. Bank records speak
21 for themselves, money going from one party to another,
22 there is going to be a lot of evidence of loans going back
23 and forth, they speak for themselves. It is the
24 interpretation of that evidence, and whether or not that
25 evidence demonstrates the crimes as alleged in the

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1 indictment.

2 Judge Bianco, in his preliminary instructions to
3 you, told you about the presumption of innocence. We live
4 in a constitutional democracy, the presumption of
5 innocence, meaning, ladies and gentlemen of the jury, that
6 if you were asked today what is your verdict, today, at
7 this moment, it would have to be not guilty. He told you
8 that the government has the burden of proof, as it should,
9 to prove the case beyond a reasonable doubt, and that
10 burden never shifts from the government.

11 He told you that the defendant does not, is not
12 required to testify, but may testify in his own behalf.
13 Ladies and gentlemen, Phil Kenner will be testifying in
14 this trial. Phil Kenner will have the opportunity to
15 address you under oath, subject to the cross-examination
16 of the government witnesses, to refute allegations you are
17 going to hear from a myriad of witnesses that come before
18 you.

19 Now, with these constitutional principles in
20 mind, what does it mean? Though Phil Kenner is the
21 accused, it is the government's case that is on trial
22 here. Once Phil Kenner was arraigned on what was the
23 first indictment in this case, November 13th, 2013,
24 another constitutional right kicked in, and that is the
25 right to defend himself through the assistance of counsel,

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1 that's me.

2 Now, the issues that will arise in this case as
3 part of the defense, ladies and gentlemen, will include:
4 how did the FBI come to target Phil Kenner for criminal
5 investigation in the first instance? What was their
6 motive? Did the FBI, during the course of this in excess
7 of six-year investigation, deliberately ignore evidence in
8 their possession, favorable evidence that may or would
9 demonstrate that Phil Kenner committed no crimes or that
10 Phil Kenner was not a coconspirator with anyone?

11 Did the FBI coach and control witnesses, to help
12 orchestrate these criminal charges? Did the government
13 give sweetheart deals as alluded to in the opening
14 statement of the government? Did the government give
15 sweetheart deals to government witnesses in return for
16 their testimony? And that will be developed a little
17 further, ladies and gentlemen, during the course of trial.
18 And did the government ignore the crimes and misdeeds of
19 others in order to orchestrate the charges against Phil
20 Kenner? Those are some of the issues.

21 With those issues in mind, let me tell you what
22 the government did not tell you. Let me tell you proof
23 that we expect you will hear during the course of this
24 trial.

25 The grand jury that voted this indictment, the

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1 indictment dated April 22nd, 2015, was not the first grand
2 jury to be impanelled to investigate Phil Kenner. In
3 2009, a grand jury was impanelled in the Southern District
4 of New York. They are separate judicial districts. The
5 Southern District of New York, ladies and gentlemen, is
6 New York County, Manhattan, other counties as well, but
7 it's Manhattan.

8 And at that point in time, that grand jury heard
9 testimony from three government witnesses at that time --
10 or I shouldn't say that -- from three of the clients who
11 Phil provided financial advice and business management to.
12 One of them you heard in the government's opening
13 statement was Michael Peca. Another one was Darryl Sydor,
14 whose name you will hear and the third was Turner
15 Stevenson.

16 Now, in this indictment, and this will in the
17 final analysis, ladies and gentlemen, be the charges that
18 you will consider when you deliberate, they charge an
19 allegation under a heading known as the Hawaii land
20 developments, and it reads, the allegation:

21 It was part of the scheme to defraud that the
22 defendant Kenner induced certain of the investors to wire
23 large amounts of money to one or more bank accounts
24 controlled by Kenner. True. That's true.

25 (Continued on next page.)

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1 MR. HALEY: (Continuing.)

2 In return for their investment, they would
3 receive an ownership interest in Little Isle IV which
4 would purchase and own a percentage of each of the
5 acquired land parcels. True, they did. They invested and
6 they received an ownership interest in Little Isle IV,
7 an LLC, which is a limited liability company, with the
8 idea of purchasing hands in Hawaii, making a profit on the
9 land and the interest is reflected on the books and
10 records of Little Isle IV, in other words, their
11 percentage interest is reflected on the ownership records.
12 That was not fraudulent. That's not fraudulent, ladies
13 and gentlemen. Did it involve some level of speculation?
14 Absolutely. But it was a considered risk by each one of
15 those investors who, God bless them, were wealthy people
16 and they saw an opportunity to make more money.

17 Perhaps not as conservative as other
18 investments, perhaps more speculative, but that means the
19 profit would be greater.

20 However, that part of indictment alleges the
21 defendant Kenner persuaded certain of the investors to
22 establish lines of credit, each line of credit was insured
23 by bonds and equities held in the investors names, that's
24 true. Then this goes on to say Kenner made a variety of
25 misrepresentations to the investors regarding lines of

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1 credit and their use. That's not true.

2 And we know that it's not true because of prior
3 grand jury testimony. From Mr. Peca in particular. In
4 his testimony when he was asked about the circumstances
5 under which he made the decision to invest in Little
6 Isle IV, he testified, and I expect that he will testify
7 here, ladies and gentlemen, that on all of them through
8 all the times I made the final decision. I may not have
9 done as much due diligence, that some may have done, it's
10 not like I had to say yes or forced, I made the decision
11 to say yes, I want to do that. Based on my money I was
12 making at the time, it didn't bother me to invest those
13 kinds of dollars.

14 That's the same little boy money, Michael Peca,
15 that the government was talking about a little while ago.
16 That's not a little boy, ladies and gentlemen he's a
17 professional hockey player, he's indicated before the
18 grand jury that he has a mind of his, and he made that
19 decision to invest in Little Isle IV.

20 He was asked how much he put into Little Isle IV
21 that accurately describes to the grand jury that he put in
22 an initial hundred thousand dollars cash investment, and
23 then later allowed his line of credit to be accessed by
24 Phil Kenner to the tune of \$1.7 million, which money again
25 was going to be used to purchase property in Hawaii.

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1 There is a central part of this case and it
2 involves an authorization, a one paragraph letter, where
3 each one of the investors signed a document that was
4 provided to Northern Trust Bank that said quite simply and
5 says quite simply and clearly, Phil Kenner has my
6 authorization to access my line of credit.

7 And when asked about the authenticity of that
8 authorization in the grand jury in the Southern District
9 of New York, his answer was: It was prepared by me, I
10 read it, and I signed it.

11 There is a claim in that part of the indictment
12 that the investors were not fully apprised of how their
13 monies would be used. Indeed, the original idea was that
14 the investment in Little Isle IV would be used to purchase
15 property in Hawaii. There came a point in time where Phil
16 Kenner along with a fellow by the name of John Kaiser, who
17 will be testifying, reached an agreement or decided hey,
18 Hawaii right now is under development. At that point it
19 stalled a little bit about, wonder if there was any other
20 opportunities for our clients as relates to real estate
21 investment. And there was an opportunity that they became
22 aware of. It was development of property in Mexico. One
23 known as Diamonte del Mar, another one known as Diamonte
24 Cabo San Lucas, and actually that development idea was
25 quite attractive. The fellow that was spearheading of

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1 that will become a central figure in this case is a fellow
2 named Ken Jowdy and the idea was let's purchase and
3 develop property in Baja Mexico to build and develop a
4 golf course for essentially the exclusive use of
5 professional athletes. So that the hockey guys, the
6 baseball guys and the football guys who you don't have to
7 be a sports fan to know are well compensated these days,
8 ladies and gentlemen, to play golf together.

9 What then happens is money out of Little
10 Isle IV's account is then loaned to Ken Jowdy at 15
11 percent interest to help develop that property in Mexico.
12 Not, the clients of -- Phil's clients were not acquiring
13 through that transaction an ownership interest in Diamante
14 Cabo San Lucas, but were acquiring the return that comes
15 from a loan at 15 percent interest.

16 So in the grand jury when Darryl Sydor was asked
17 about that, did you know in advance that it, Hawaii funds,
18 were going to be used, the Little Isle IV money to be used
19 to salvage Cabo investments Sydor, yes, it was to be used
20 to help with a short, short-term loan to the funding to
21 Cabo, and it was supposed to be paid back but that's,
22 question: Paid back to you or paid back to Little
23 Isle IV? Sydor paid back to Little Isle IV. Question:
24 So? Sydor, back to Hawaii, not me personally, but that
25 didn't happen, that didn't happen. We'll be talking about

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1 why it didn't happen in a moment. Turner Stevenson on
2 that very point, ladies and gentlemen, and I won't go
3 through all the testimony but I will read this: When
4 Turner Stevenson was asked in the grand jury this
5 question: So you are saying that you agreed to transfer
6 some of the money from the Hawaii project to the Cabo
7 project. Stevenson, I would say that yes. Who made that
8 decision? Stevenson: I think all of us as a group.
9 What do you mean as a group? Who is the group?
10 Stevenson, all the guys who were investing in this.

11 Now, on that issue in addition to grand jury
12 testimony there is testimony from other government
13 witnesses in other legal proceedings. There are by my
14 calculation, the proof will show this, approximately 12
15 other civil lawsuits, civil lawsuits by various parties
16 against each other, including Ken Jowdy, that underlie
17 many of the allegations in this criminal indictment if not
18 all of the allegations in this criminal indictment. And
19 frankly, ladies and gentlemen, that's where this case
20 belongs. In civil court not in criminal court.

21 But, Jason Wooley in what is known as the Nolan
22 arbitration when asked this question: And did Mr. Kenner
23 show you any projects that he was interested in for
24 himself.

25 "Answer: Yes.

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1 "Question: Were they in Mexico and Hawaii?

2 "Answer: Yes. They were.

3 "Question: Did you also invest in the Cabo
4 project as well?

5 I sure did.

6 "Question: Did you also invest in Hawaii
7 property?

8 "Answer: I sure did.

9 "Question: At any time did Kenner push these
10 investments on you?

11 No. I'm a big boy. I make my own decisions.
12 My wife and I are our own counsel. I knew I had no chance
13 of getting it back, I was perfectly okay with that.

14 Do you blame in any way Kenner for this
15 investment going slower than was anticipated?

16 "Answer: Not at all.

17 Critical question: Did you -- did you feel that
18 you completely understood the risks when you made this
19 type of investment as far as what would satisfy you?

20 "Answer: Absolutely."

21 I mentioned other lawsuits, ladies and
22 gentlemen, Owen Nolan filed a lawsuit against Phil and he
23 did say pursuant to the terms and conditions of what was
24 known as a standard advisory agreement, that was an
25 agreement that Phil had with all of his investor clients

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1 and what it says is if there is a dispute between us, you
2 have a right to arbitrate. It's actually beneficial,
3 ladies and gentlemen, for an investor, because it goes to
4 an arbitration panel rather than a more expensive --

5 MR. MISKIEWICZ: Objection, this is not a civil
6 case.

7 MR. HALEY: Judge, I'll rephrase the remark.
8 Nolan commenced an arbitration proceeding.

9 MR. MISKIEWICZ: Objection.

10 THE COURT: Members of the jury, I'm going to
11 instruct you as to what the charges are and the law is.
12 These are the opening statements by the attorneys of what
13 they expect evidence to show or not to show and you should
14 take them as such. Okay.

15 MR. HALEY: Thank you, Judge.

16 It has relevance in this respect, ladies and
17 gentlemen, when asked in that proceeding do you feel that
18 he, meaning Phil Kenner, misled you about these or they
19 just didn't explain them fully to you, meaning the
20 investments, his answer was: I don't think he fully
21 explained to me about how things worked."

22 Not that he lied to me, I just don't think he
23 fully explained it. And the government wants you to base
24 a criminal conviction on that type of statement.

25 All right. So after the grand jury empanelled

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1 in the Southern District of New York hears the evidence of
2 those three witnesses, they do not move to indict.

3 MR. MISKIEWICZ: Objection.

4 Sidebar.

5 THE COURT: Sustained. Sustained. The jury
6 will completely disregard that statement. That is not
7 something the jury should consider. You should not
8 speculate as to that. You should disregard that
9 completely.

10 MR. HALEY: Well, there does come a point in
11 time, ladies and gentlemen, on November 13, 2013, that
12 Phil Kenner is arraigned on an indictment, the first
13 indictment that resulted in his arrest and arraignment on
14 these charges. As I said, at that point in time he
15 obtained the assistance of counsel to defend himself. In
16 that indictment.

17 MR. MISKIEWICZ: Objection, your Honor. May we
18 approach.

19 THE COURT: Yes.

20 Members of the jury, we're going to take the
21 morning break now. Please don't discuss the case.

22 (Whereupon, the jury retired from the
23 courtroom.)

24 THE COURT: Everyone can be seated. Mr. Haley,
25 what made you think that you could refer to the Southern

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1 District grand jury not returning an indictment? What
2 made think that that was a proper thing to place before
3 this jury?

4 MR. HALEY: Your Honor, I believe in
5 representing my client, as I indicated in my opening
6 statement --

7 THE COURT: Mr. Haley, did the grand jury return
8 a no true bill in the Southern District?

9 MR. HALEY: I don't know --

10 THE COURT: I asked you did they present you
11 with the charges? Because what you did was suggest to
12 this jury that they returned a no true bill. You said
13 they declined to indict. That was improper, that -- the
14 inference that you want the jury to draw is completely
15 improper. As a matter of fact, I had in my notes to tell
16 you not to do that, and I forgot to tell you, because I
17 was concerned that you might do that. In fact, you did
18 it. It's completely improper.

19 MR. HALEY: Your Honor, I don't know how to
20 respond because I understand your Honor's view of that.

21 THE COURT: What's your view of it?

22 MR. HALEY: What I said, your Honor, after that
23 was presented to the grand jury in the Southern District
24 of New York, it did not move to indict. That's all I
25 said. Now, Judge, there could be two inferences -- your

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1 Honor may I just finish the record?

2 THE COURT: No. You can write the letter and
3 put it on the record. It's done already. I'm not going
4 to waste time. It was completely improper, the inference
5 was that they returned a no true bill. They heard the
6 evidence and they said there was no crime here and as far
7 as I know that's not what happened. So --

8 MR. HALEY: Judge.

9 THE COURT: No, we're not going to waste time on
10 it. That's my conclusion, if you want to make a record,
11 you can do it on your own time. We're not doing it now.

12 MR. HALEY: Okay.

13 MR. MISKIEWICZ: Your Honor, may I request a --
14 some form of curative instruction given to the jury before
15 he continues that essentially the indictment is just what
16 it is, I think your Honor already referenced it, and not
17 only they should not speculate about other charges. Also
18 I hear in Mr. Haley's opening that he's about to make
19 reference to the fact that there's an underlying
20 indictment and I think he's going to suggest that's also
21 improper and they should draw inferences on that. I
22 suggest if he goes down that pike that he be precluded
23 from doing so.

24 He should be precluded from making reference to
25 an underlying indictment. We have one indictment here

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1 what the defendants are charged with and facing in this
2 trial. 2, that some sort of curative instruction be
3 given. Otherwise, your Honor, he has so polluted this
4 jury right now, we have no choice but to ask for a
5 potential mistrial. I haven't talked about this with
6 counsel, but he has really just screwed, pardon the
7 expression, the record here in the most unprofessional
8 and -- I have never seen anything like this.

9 THE COURT: Mr. Haley.

10 MR. HALEY: May I be heard, Judge?

11 THE COURT: Yes. First of all, Mr. Miskiewicz,
12 as you heard, I gave the jury an immediate instruction
13 with respect to the Southern District grand jury. I don't
14 have anything else to say on that. To the extent that
15 Mr. Haley is now going to start going through the various
16 iterations of the indictment I want to hear what he's
17 about to do. I don't -- I don't know what other
18 instruction I can give other than I told them to disregard
19 it, it's irrelevant, they should not speculate.

20 MR. MISKIEWICZ: Would the Court give an
21 instruction that there is no such thing as a true bill in
22 the Southern District? Never happened. In effect he
23 lied. And I can't put it anymore simply than that. He's
24 lied to this jury, and that is the basis for really the
25 prejudice that he's caused and I am asking for a form of a

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1 curative instruction that would explain that to the jury.
2 Not necessarily that he lied, but that he's wrong.

3 MR. HALEY: Judge, may I explain myself in that
4 regard? I don't want to belabor the record, Judge, or we
5 move on?

6 THE COURT: No. I told you if you want to
7 explain yourself put it in a letter. I don't need to hear
8 the explanation now.

9 MR. HALEY: Your Honor, as relates to the next
10 body, let me say this, the November 13th -- actually it
11 was October 29, 2013 when that indictment was first
12 returned, the first indictment in this case and that the
13 indictment that Phil Kenner was arraigned on on November
14 13, 2013.

15 Within that indictment, Judge, there was a
16 specific allegation of criminal conduct that was
17 devastating in nature, because it referred to the transfer
18 of monies to an account controlled by Tommy Constantine to
19 the tune of \$725,000 and then subsequently the transfer of
20 approximately 170,000 of that 725 from the bank account
21 controlled by Constantine from bank account controlled by
22 Kenner. That appears, Judge, in paragraph 30 and 31 of
23 that indictment.

24 Once we commenced the Rule 16 discovery, it was
25 clear that that never occurred. What the bank records

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1 reflect, Judge, is there was a \$25,000 deposit into the
2 bank account controlled by Tommy Constantine from Phil
3 Kenner and within a week or so thereafter \$17,000 went out
4 from that account to Phil Kenner. Judge, that was a
5 representation made to a grand jury in the course of this
6 investigation that was simply false.

7 THE COURT: Okay. I understand the issues,
8 Mr. Haley, I understand the issue. My ruling is as
9 follows. You're not to refer at this juncture to prior
10 versions of the indictment. If in fact there is evidence
11 that someone gave that testimony, false testimony, that
12 led to that allegation being in the indictment and that
13 witness comes here and testifies in court, obviously you
14 can impeach them on whether that particular allegation is
15 true or false and whether someone committed perjury before
16 the grand jury.

17 But starting to bring before the jury that --
18 two versions of the indictment and start having them
19 compare and once again speculate as to why an allegation
20 was eliminated or not eliminated is not a proper avenue as
21 far as I'm concerned.

22 So at this point I'm precluding you from
23 referencing other prior indictments and allegations that
24 were in there versus allegations that are in this
25 indictment. If you believe that that's proper, you can

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1 show me the case law that suggests that, but I think the
2 proper way to do that would be to question any witnesses
3 who may have committed perjury in your view with respect
4 to those allegations, not just having the jury compare the
5 indictments and they can speculate as to why the
6 government made the decision as to eliminate a certain
7 allegation, that's not the way it works.

8 MR. HALEY: Your Honor made a ruling.

9 THE COURT: Yes. That's my ruling. Okay.

10 MR. LA RUSSO: Your Honor, may I be heard.

11 THE COURT: Yes.

12 MR. LA RUSSO: Just briefly and I will likewise
13 ask for a little additional time because I'm going to
14 address some of the issues to the jury to comply with the
15 Court's order. But we are going to be arguing, Judge and
16 I think the Court may be aware of this because I raised
17 this sometime before, is that Mr. Galioto was the case
18 agent and based upon his investigation we have a fact
19 allegation that was made in the indictment that turned out
20 to be incorrect, false, it was false because they didn't
21 do the proper investigation.

22 What happens is Mr. Miskiewicz recognizing that,
23 he then returns a Superseding Indictment removing that
24 specific allegation.

25 THE COURT: Maybe you can question the agent

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1 regarding that.

2 MR. LA RUSSO: We intend to.

3 THE COURT: But talking about the different
4 versions of the indictment at this point in opening
5 statement I think is confusing for a jury. We have enough
6 to deal with the current version of the indictment, rather
7 than comparing with the prior version and speculating in
8 the opening statement why Mr. Miskiewicz took it out.

9 MR. LA RUSSO: The point is we are asking this
10 jury to look at the conduct of the agent and based upon
11 that conduct, my client was indicted for an allegation, a
12 criminal charge that was false. We then come, I'll give
13 you a specific example. They allege that \$250,000 was
14 stolen back in 2002 and the victim was a man by the name
15 of Owen Nolan, a former hockey player, when we
16 demonstrated that that was false, we then get a
17 Superseding Indictment and that's now removed, what do we
18 hear, the government tells us it's John Juneau. I hate to
19 tell you, Judge, that's not true either. They're getting
20 information that Mr. Galioto was presenting not just
21 allegations, they're false allegations and it's removing
22 that information from the indictment, how can you ask the
23 jury to focus on the misconduct of the agent not
24 necessarily intentionally, but either failing to do the
25 job he was supposed to, failing to examine the evidence he

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1 was supposed to that led to the charges without at least
2 referring to the evidence. I agree with the Court you
3 can't say that because the Southern District did not
4 return an indictment that that means that the defendants
5 are innocent. I understand that.

6 THE COURT: Maybe Mr. Miskiewicz removed
7 allegations in the indictment because he wanted to make
8 the case streamlined and easier to present to the jury. I
9 don't know why they removed it.

10 MR. LA RUSSO: He did.

11 THE COURT: So you want to put Mr. Miskiewicz on
12 the stand and tell you why he removed something? My
13 ruling is the same, at this point in the case, the opening
14 statement -- the only version of the indictment to be
15 referred to is the one that the defendants are on trial
16 enforcement anything else being done at this point would
17 be confusing, would require speculation and in my view is
18 improper at this point.

19 If you want to argue to me after you questioned
20 the agents or other witnesses who led to false allegations
21 being put in a prior indictment that in addition to
22 presenting to the jury that they provided false
23 information to the prosecutors, to the Southern District
24 grand jury, to whoever they provided the false information
25 to, we start examining the various iterations of the

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1 indictment to the jury, I'll entertain that at that point.
2 Right now we have nothing. We have the opening statements
3 and we're starting to talk to the jury about different
4 versions of the indictment. I'm not going to allow it at
5 this point. Okay. If you want to revisit that, that's
6 fine. I want to be clear, I'm not saying that you can't
7 cross the agent on the information provided to the
8 prosecutors and what may have turned out to be true or
9 false. That's completely proper. But the idea of parsing
10 through multiple versions of an indictment, I haven't seen
11 it before in a trial, if you want to point me to a judge
12 who has allowed the defense lawyers to put up all the
13 versions of the indictment and start telling the jury this
14 paragraph changed, and this paragraph changed, then they
15 want them to speculate that that is because they aren't
16 true, then we'll start entertaining that. I don't have
17 any such case law in front of me. If I'm sitting here
18 starting to hear that about other versions of the
19 indictment, the Southern District grand jury -- suggests
20 that the Southern District grand jury declined to
21 prosecute the case are so far afield I'm disturbed by
22 what's happened so far. And you haven't even got up yet.

23 MR. LA RUSSO: That's my concern.

24 THE COURT: Let me make it clear, there should
25 be no reference, no reference -- it was fine Mr. Haley

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1 referenced the case starting in the Southern District.
2 There should be no reference to the grand jury's -- any
3 suggestion that the grand jury made a decision not to
4 bring charges and there should be no reference to that or
5 suggestion that the Southern District of New York
6 prosecutors declined to bring charges, and that's why the
7 case was brought in the Eastern District of New York.
8 Okay. Those matters are not in the record. You're asking
9 the jury to speculate as to those things and there should
10 be no reference to the reason the case may have gone from
11 Southern to Eastern District of New York. It's just
12 speculation. Okay.

13 MR. MISKIEWICZ: Your Honor, I have one more
14 application that has to do Mr. La Russo's opening, he has
15 in prior openings, referred to himself as a prior
16 Assistant US Attorney. We've heard enough sort of
17 second-guessing of the government's strategy here.

18 MR. LA RUSSO: I'm not going to, but that would
19 have been a good one. I forgot about that one, Judge.
20 Thank you.

21 THE COURT: Let's take our break. All right.

22 MR. LA RUSSO: Your Honor, may I ask for a
23 little more time. I want to make sure I go through my
24 opening. I don't want to have a skewer of the Court's
25 order.

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1 THE COURT: All right.

2 MR. LA RUSSO: Thank you.

3 (Recess taken at this point.)

4 (After recess.)

5 MR. LA RUSSO: Your Honor, thank you for the
6 time. I cleared up some of the problems there. Thank
7 you.

8 MR. MISKIEWICZ: I am formally asking for a
9 mistrial.

10 THE COURT: On what grounds?

11 MR. MISKIEWICZ: The nature of the statement is
12 so prejudicial to the government's case and so outrageous,
13 that it makes it difficult even with a curative
14 instruction for any jury now to view this evidence
15 dispassionately.

16 THE COURT: Mr. La Russo?

17 MR. LA RUSSO: May I just have one moment,
18 Judge? Thank you for your indulgence, your Honor.

19 MR. HALEY: Your Honor, may address the Court?

20 THE COURT: No.

21 MR. LA RUSSO: Your Honor, I'm going to take the
22 middle road here and indicate to the Court like I did
23 before, I understand the government's position, I
24 understand the Court's concern, but much of our case is
25 going to hinge upon either deliberate or intentional

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1 misconduct by the agent getting us where we are. I don't
2 think I can take a position where based upon what we're
3 going to do based upon what happened in the courtroom
4 today.

5 I do want to indicate to the Court I had some
6 comments in my opening statement somewhat similar to
7 Mr. Haley's. They've been removed, of course. I'm not
8 talking about prior indictments and any inferences you may
9 draw from that. But we will be either if this case goes
10 forward there has been from the government's point of view
11 a constant change of factual allegations, whether they
12 just bring in the indictment or the agent's point of view
13 where he keeps changing the theory to try and suit their
14 position. I really can't take a position.

15 THE COURT: There's two different things,
16 Mr. La Russo. I want to emphasize I understand it's a
17 core part of the case to try and impeach the government's
18 investigation and their case agents handling of that
19 investigation, I'm going to let you do that. The only
20 issue is whether or not -- there's two issues, first issue
21 is whether or not in opening statement a jury should be
22 exposed to different versions of the indictment and start
23 comparing the versions and essentially opening statements
24 they have to speculate as to why certain things were in
25 and removed and my ruling at this point in the case is

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1 it's not proper to do that. I'm willing to revisit that
2 issue of whether or not after you question the witnesses
3 whether or not in fact the issue of prior indictment
4 should come in, I'm not ruling that it's off grounds
5 forever, only for purposes of the opening statement.

6 But the separate issue is whether or not the
7 fact that Mr. Haley suggested to this jury that the grand
8 jury in the Southern District made a decision not to bring
9 charges, that's the issue that I'm focused on.

10 MR. LA RUSSO: I understand, Judge, and
11 respectfully I'm not going take a position on the
12 government's application.

13 THE COURT: Mr. Haley.

14 MR. HALEY: Thank you, your Honor. Your Honor,
15 I simply stated a fact and it was not my intention other
16 than to state that fact. We have a jury that knows that
17 three government witnesses testified before a grand jury
18 in the Southern District of New York. To simply leave
19 that up in the air, Judge, it was not my intention to
20 prejudice anyone. It was simply my intention to lay out
21 what I believed to be a factual timeline. Might I add,
22 Judge, in the course of this proceeding Rule 16 discovery
23 we were provided this information by the government as
24 information that may be helpful to the defense.

25 With all due respect, Judge, I think that what's

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1 occurred here is we're making this more of an issue that
2 in the minds of the trier of the fact than it really is,
3 and I frankly, Judge, would oppose a mistrial based upon
4 what's transpired at this point in time.

5 Your Honor your Honor gave a curative
6 instruction. The jury will disregard -- these are bright
7 people. There's no question that they can follow the
8 Court's instruction. I do apologize, Judge, so far as the
9 court found my conduct to be inappropriate. It was not my
10 intention to do anything inappropriate. It was my
11 intention to state a fact, and I don't know what more to
12 say as far as that's concerned, Judge.

13 THE COURT: Okay. I'm going to deny the motion
14 for a mistrial. First of all, it was not a statement of
15 the timeline, I wasn't born yesterday -- I've been doing
16 this a long time -- that the intention was to suggest to
17 the jury that a decision was made by another grand jury
18 not to bring charges rather than a prosecutor not
19 presenting charges, the implication was that a conscious
20 decision was made by the Southern District grand jury not
21 to bring charges. I don't believe that's the core of the
22 case and the government is representing to me that's not
23 what happened in the Southern District.

24 So that was a clear import of that statement of
25 the timeline that was established by Mr. Haley. The

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1 reference to the Southern District grand jury was fine.
2 This jury is going to hear people testifying in the
3 Southern District grand jury that was fine. It was the
4 implication that the decision was made not to bring
5 charges which in my view is disturbing, inaccurate and was
6 inappropriate for the reasons I've already stated.
7 However, I did give the need to give an immediate curative
8 instruction and I don't think that there's a sufficient
9 basis to grant a mistrial.

10 I will entertain -- I'm not going to say
11 anything further now, but I will entertain some type of
12 further instruction being given to the jury at the end of
13 the case or at some later time. I think that I covered it
14 in my instruction there, but I would entertain that, but
15 I'm not going to do anything further at this point,
16 because my response I thought was immediate and thorough.

17 Okay. So we'll continue now. I'll bring the
18 jury back in.

19 MR. MISKIEWICZ: Your Honor, one last thing that
20 just came up, I anticipate the continue -- this may come
21 up with Mr. La Russo's opening, I made no objection when
22 Mr. Haley started reading from grand jury testimony of
23 people who are anticipated or that we anticipate either
24 will be our witnesses or their witnesses that they've
25 identified, to the extent that they start reading from

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1 depositions or grand jury testimony that neither side
2 intends to call, I think that's inappropriate because
3 they're doing exactly what you told the jury you know, is
4 inappropriate, which is he's testifying. And so I would
5 ask that they limit their comments to either witnesses
6 they intend to call or witnesses that are, that have been
7 identified through 3500 authorities.

8 This Turner Stevenson individual has appeared
9 nowhere in anybody's list and yet he's now read from his
10 testimony. Again it's something that I've absolutely
11 never seen in years practiced.

12 MR. HALEY: May I respond, Judge?

13 THE COURT: Yes.

14 MR. HALEY: Your Honor, I've always understood
15 opening statements to be exactly what they are, they're
16 not evidence, the jury is focused on evidence, Judge. In
17 connection with witnesses that we intend on calling for
18 purposes of the defense, I have in my own mind listed
19 those witnesses, I envision we will absolutely be calling
20 witnesses, in large measure it depends upon the testimony
21 as adduced by the government's witnesses as to whether or
22 not we call a particular witness. I dare say the
23 government make a representation to a jury in an opening
24 statement and they fail to introduce that evidence during
25 the course of the trial, there's no mistrial. The

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1 opponent may, if he or she wishes, point out to the jury
2 that there was an opening statement where a representation
3 was made and they didn't follow through with that
4 representation. That's why they're called opening
5 statements, Judge. But Judge, as I said before, this is a
6 complex case, I need to parse out the various allegations
7 in as best as I'm able to present what we see as the
8 viable defense to this matter. That's what I believe I've
9 done, Judge, that's my obligation -- I don't mean to
10 interrupt the Court -- as I see it to my client.

11 THE COURT: The way to do that in opening
12 statement Mr. Haley is to say I anticipate the testimony
13 of this witness to be X or to be Y. I was quite surprised
14 myself to see you start pulling out grand jury transcripts
15 and reading from them, because first of all it's hearsay,
16 if the government started pulling out grand jury
17 transcript during their opening and reading from it I'm
18 sure I would have seen objections. And the rules apply to
19 both sides in defending their clients. There's no special
20 rules for defendants. Taking the grand jury transcripts
21 you said, okay, here is the question, here is the answer,
22 because it's hearsay, we don't know whether those
23 transcripts are coming in. The proper way do that is to
24 say I anticipate when this witness takes the stand, I'm
25 hoping that we're not going to hear more reading of the

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1 grand jury transcript. I hope you're not intending to
2 read any more readings of the grand jury transcripts.

3 MR. HALEY: No, but what I anticipate in
4 connection with proof at trial if based upon prior sworn
5 testimony it's a pretty reliable argument for a defense
6 attorney to make.

7 THE COURT: I understand that, that's why I
8 think the government didn't object. But again, in an
9 opening statement you're telling the jury what you
10 anticipate the evidence to be. I'm not going to give any
11 blanket instructions to the defense. If they in good
12 faith believe that they call a witness in good faith to
13 testify, they will have to make such a statement in their
14 opening. You said that name wasn't on the witness list
15 which concerns me, but I'm going to have to take it on a
16 case by case.

17 If you refer to another witness that is not on
18 the witness list, you can object at this point.

19 MR. MISKIEWICZ: Thank you, your Honor.

20 THE COURT: Okay. Let's bring the jury in.
21 Everyone be seated for a minute.

22 THE COURT: Juror number 3 says there's a Ms.
23 DeGray in the audience?

24 MR. MISKIEWICZ: Doesn't sound like a name
25 that's familiar.

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1 THE COURT: Is there a Lisa DeGray? Ms. DeGray?

2 MR. MISKIEWICZ: I'm told that there was
3 somebody who works in the US Attorney's office, in the
4 civil division who was seated in the back that's
5 Ms. DeGray.

6 THE COURT: She's not working on the case?

7 MR. MISKIEWICZ: No.

8 THE COURT: So do you want me to question him
9 regarding that? Do you want me to --

10 MR. HALEY: Your Honor, I see no need to
11 question the juror.

12 THE COURT: I know, I don't want him to be
13 worried about it. I don't want him to think she's
14 involved in the case. Is she a paralegal or attorney?

15 MR. MISKIEWICZ: I believe she's a support
16 staff, not an attorney.

17 MR. LA RUSSO: It seems to me, Judge, I, like
18 Mr. Haley, don't think it's a major problem. But normally
19 during the voir dire they say they know somebody in the
20 US Attorney's Office, I didn't hear that.

21 THE COURT: Maybe she works in the US Attorney's
22 office.

23 MR. LA RUSSO: That's probably true, too, if you
24 want, you can ask her first do you recognize, how do you
25 recognize and what do you know if that person does

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1 anything to avoid any kind of inference that they maybe
2 employed by the US Attorney's Office. Again, I don't have
3 a major objection.

4 THE COURT: Why don't I bring him out and ask
5 him how he thinks he knows her. Is there any objection to
6 that.

7 MR. MISKIEWICZ: No, your Honor.

8 MR. HALEY: No, sir.

9 MR. LA RUSSO: No.

10 THE COURT: Bring him out.

11 (Juror Number 3 enters the courtroom.)

12 THE COURT: Hello, sir, you can sit in the first
13 chair there. My law clerk told me that you believe that
14 you recognize someone in the audience?

15 JUROR NO. 3: Yes.

16 THE COURT: Can you tell me who that was and how
17 you know her.

18 JUROR NO. 3: She's my friend's daughter, Lisa
19 DeGray.

20 THE COURT: And what do you know about her in
21 terms of do you know where she works.

22 JUROR NO. 3: I know she works in this building
23 for a contractor for the federal government.

24 THE COURT: Okay. Ms. DeGray is not involved in
25 any way in the prosecution of this case. Obviously it's a

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1 public courtroom. Anyone can come in and watch.

2 JUROR NO. 3: Right.

3 THE COURT: I just wanted to make sure, this is
4 similar a question that I asked in the jury questions, is
5 there anything about her employment that would affect your
6 ability to be fair and impartial to both sides in the
7 case?

8 JUROR NO. 3: No.

9 THE COURT: Thank you. You can go back.

10 (Juror number 3 retires from the courtroom.)

11 THE COURT: Anyone have any issue?

12 MR. LA RUSSO: No, your Honor.

13 MR. HALEY: No, sir.

14 MR. MISKIEWICZ: No, your Honor.

15 THE COURT: Okay. Let's bring them in.

16 (Whereupon, the jury entered the courtroom.)

17 THE COURT: Everyone can be seated. Okay,
18 members of the jury, I apologize for the delay. We'll now
19 continued with Mr. Haley's opening statement.

20 MR. HALEY: Thank you, your Honor.

21 I guess where we left off, ladies and gentlemen,
22 I had spoken to you about allegations in the indictment in
23 connection with what we expect the proof to show
24 concerning the knowledge of the client investors with
25 respect to their lines of credit and how those lines of

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1 credit would be used to invest in Hawaii and indeed loan
2 money to a fellow by the name of Ken Jowdy. Let's move on
3 to additional allegations in the indictment as relates to
4 the Hawaiian land development alleged scheme. The proof
5 will show, ladies and gentlemen, that when the Hawaiian
6 land development investment came to an end and for a
7 variety of reasons, as the proof will show, during the
8 downturn in the real estate market and ultimately the
9 bankruptcy of the Lehman Brothers that had loaned some
10 money to the Hawaiian land development, that the investors
11 who had committed their lines of credit for purposes of
12 the Hawaiian investment did lose money. As a matter of
13 fact, in the final analysis they only received about a
14 return of 40 percent back on their investment in the
15 Hawaiian land development project.

16 But for all the allegations of fraud as relates
17 to the Hawaiian land development, we would not be here
18 today, in my view, as the proof will show, if a fellow by
19 the name of Ken Jowdy -- who has a lot of money -- it's
20 other people's money, but he has a lot of it -- had made
21 good on the loan. And what do I mean by that?

22 The proof will show as I told you before, that
23 there came a point in time where Phil Kenner as a managing
24 member of the LLC, Little Isle IV LLC, and we will
25 maintain along with the knowledge of a fellow by the name

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1 of John Kaiser, decided that they'd use some of the money
2 against the loan to Ken Jowdy to develop a golf course
3 project in Baja, Mexico. And he had a contractual
4 commitment to pay back that loan which exceeded \$5.5
5 million, and at 15 percent interest, had he paid it back,
6 the proof will show that those investors had only received
7 about a 40 percent return on their investment, would have
8 been if not made whole, close to being made whole in terms
9 of their investment.

10 Now, initially that loan to Ken Jowdy was
11 without a written agreement. In other words, money was
12 coming out of two accounts, Little Isle IV and Ula Makika
13 going to Ken Jowdy, and indeed what the bank records will
14 show is money was going back to Little Isle IV, not as
15 much as was being sent but money was going back, just like
16 a loan, you pay interest on a loan.

17 There comes a point in time, ladies and
18 gentlemen, that on December 7, 2004, a loan agreement, a
19 revolving line of credit agreement is executed between Ken
20 Jowdy and Phil Kenner, that loan agreement actually was
21 witnessed by another person, witness -- it says witness.
22 And his name is Robert Gaudet.

23 Now, John Kaiser knows that this loan existed,
24 John Kaiser knows that Ken Jowdy was receiving monies from
25 Little Isle IV to be paid back as a loan and John Kaiser

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1 knows that, as the proof will show, because he met twice
2 in New York City with Ken Jowdy the second occasion while
3 in a bar they discussed the loan.

4 Whether John Kaiser will testify to that or not
5 today we don't know. We know that that's what he told the
6 FBI, that that was conversations taking place, when I say
7 we don't know what John Kaiser will say today is because
8 John Kaiser is now employed by Ken Jowdy.

9 As the proof will show he is now director of
10 construction down at Diamonte Cabo San Lucas. He'll
11 testify, I don't believe the proof will show, that he has
12 a degree in architecture. I don't believe the proof will
13 show that he has a degree in civil engineering, but he is
14 now receiving compensation from Ken Jowdy as his director
15 of construction.

16 (Continued on next page.)

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Mr. Haley - Opening

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1 MR. HALEY: It's important because John Kaiser
2 will be a witness that will be levying a myriad of
3 allegations against Phil Kenner when John Kaiser
4 testifies.

5 Another person that will be making accusations
6 against Phil Kenner when he testifies is a fellow by the
7 name of Bryan Berard. Bryan Berard also is now employed
8 by Ken Jowdy in Diamante Cabo San Lucas. That's what the
9 proof will show.

10 Well, there comes a point in time when Phil
11 Kenner, in pursuit of his claim against Ken Jowdy to pay
12 back the money that Jowdy loaned out to Little Isle IV at
13 15 percent interest, where they engage in negotiations as
14 you might imagine. There's a settlement agreement as the
15 proof will show wherein that loan is specifically
16 referenced.

17 Now, each parties have lawyers, each parties are
18 engaged in these negotiations, but it gets noted in a
19 settlement agreement.

20 At that point in time the calculation was \$8.5
21 million loan to Little Isle IV, so there's that
22 understanding among the parties.

23 And here's where it gets really interesting,
24 ladies and gentlemen, if not disturbing from the defense
25 standpoint.

Mr. Haley - Opening

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1 In or about 2008, Phil Kenner meets with Ken
2 Jowdy and he meets with a fellow by the name of William
3 Najurn, as the proof will show. William Najurn is the
4 brother-in-law of Ken Jowdy, an attorney, and during the
5 course of the meeting Phil Kenner is pressing Jowdy for
6 the return of this money with respect to the loan.

7 And Jowdy says, in substance, I'm not paying it
8 back because I have the FBI on my side and I am going to
9 get a loan from Lehman Brothers to finance this
10 development, so I need no more money from you and I need
11 not acknowledge your loan.

12 Now, Phil Kenner, as I said, will testify in
13 this matter. He's subject to cross-examination as I told
14 you a moment ago.

15 But whether or not Ken Jowdy had a buddy in the
16 FBI is indeed true, because the proof will show that in an
17 e-mail dated July 8, 2005, between Phil Kenner and Ken
18 Jowdy, Ken Jowdy referred and he used the term good buddy
19 in the FBI.

20 The proof will show, ladies and gentlemen, based
21 upon that e-mail and actually based upon testimony as
22 well, that that good buddy was at the time in the FBI and
23 his name is John Behnke.

24 John Behnke, as the proof will show, is no
25 longer employed by the FBI. He is instead the director of

Mr. Haley - Opening

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1 security at Diamante Cabo San Lucas, Ken Jowdy's golf
2 resort.

3 So we got Jowdy, we got Behnke as a security
4 director, we have John Kaiser as his director of
5 construction and we have Bryan Berard.

6 Well, Phil Kenner should have listened I guess
7 to Ken Jowdy. He didn't.

8 In 2009, he files a lawsuit against Ken Jowdy
9 for the return of that money on loan.

10 And at some point after Phil Kenner files a
11 lawsuit against Ken Jowdy in the United States District
12 Court for the District of Arizona, Phil Kenner learns that
13 he's under investigation by the FBI.

14 He knows that because his bank records are
15 getting subpoenaed; and, indeed, there does come a point
16 in time as I referred to before that on October 29, 2013,
17 an indictment accusing Phil Kenner of a variety of frauds,
18 including the Hawaiian land development is handed up here
19 in the Eastern District of New York.

20 As I said before, ladies and gentlemen, had
21 Jowdy paid back that loan with interest, we probably
22 wouldn't be here today.

23 Why do I say that? Because it's a little bit
24 for the government to convince a jury the crimes have been
25 crimes. I'm not talking about the civil disputes when the

Mr. Haley - Opening

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1 alleged victims have essentially not lost any money. They
2 would not have lost any money of any significance had Ken
3 Jowdy paid back the loan.

4 Indeed, it has even further relevance when it
5 comes to the Global Settlement Fund because the Global
6 Settlement Fund was established primarily for the
7 investors to create a war chest where they could then sue
8 Jowdy to obtain the return of that money on loan.

9 I hope I haven't exhausted your patience at this
10 point, ladies and gentlemen, but if you could bear with me
11 only because of the nature of this indictment involves a
12 myriad of allegations, nine counts that you're ultimately
13 going to have to render a determination on.

14 Let's talk about the Global Settlement Fund
15 which is the second alleged scheme to defraud in this
16 indictment.

17 But before I go further, as I said before,
18 there's going to be bank records. They speak for
19 themselves. I will tell you this.

20 There's no question, as the proof will show,
21 that Phil Kenner and Tommy Constantine had business
22 relationships together. No question about that.

23 You're going to see a lot of money going back
24 and forth between the two of them, loans into different
25 account. None of that is disputed, ladies and gentlemen.

Mr. Haley - Opening

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1 As I said at the beginning, the dispute is whether it's
2 evidence of criminal activity.

3 You'll see e-mails. And, by the way, some of
4 these e-mails between the parties, they didn't know it
5 would ultimately be in front of you, ladies and gentlemen.
6 There's going to be language that is offensive, but we're
7 all adults here. It's what guys do sometimes when we're
8 communicating in e-mails.

9 Let's get back to what the government did not
10 tell you in their opening statement.

11 The proof will show, ladies and gentlemen,
12 through Phil Kenner's testimony and his identification of
13 e-mails between himself and others, that a point in time
14 was reached where Phil Kenner saw that Tommy Constantine
15 was not using the money appropriately for the global
16 settlement purposes.

17 Once again, that Global Settlement Fund was set
18 up primarily for litigation purposes. There were other
19 aspects of what was to be done with the money that we will
20 sift out throughout the trial.

21 But Phil Kenner's charged as a coconspirator by
22 the government saying he conspired with Tommy Constantine
23 to misappropriate funds.

24 Well, when Phil Kenner saw that Tommy had
25 misappropriated funds, he didn't remain silent as you

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1 would expect a coconspirator to do, ladies and gentlemen.

2 In an e-mail dated April 19, 2011, to various
3 client/investors, Phil wrote:

4 As you are aware, Constantine has
5 misappropriated the lion's shares of GSF, Global
6 Settlement Fund, that would have been a great assistance
7 to us in the Mexican pursuit of Jowdy for his own benefit.

8 It has left me very little financial options
9 while trying not to quit our legal dispute.

10 And that e-mail was sent long before Phil Kenner
11 was charged with these offenses.

12 He didn't have a crystal ball saying I know I'm
13 going to be charged sometime in the future, so let me
14 formulate an e-mail where I now announce that Tommy
15 Constantine has misappropriated monies. Tommy Constantine
16 misappropriated, Phil saw it, and he let his investors
17 know about it.

18 Now, as far as the allegations that Kenner was a
19 coconspirator with Constantine with reference to the
20 Eufora alleged fraud, let's parse out those allegations.

21 In the indictment it alleges that it was further
22 part of the scheme to defraud that between February 2008
23 and May 2009, the defendant Kenner convinced John Does two
24 through four, John Doe eight and John Doe nine to invest
25 money in Eufora, in exchange for an ownership interest in

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1 the company, by representing to each of them that Eufora
2 was a promising company with potential for growth.

3 That's true. He did represent that to his
4 investors, and it's true. Eufora is and we maintain
5 was -- excuse me -- was and we maintain still is a
6 promising company with great potential for growth.

7 It holds a patent, ladies and gentlemen, for a
8 process involving prepaid debit cards where individuals
9 who subscribe to the Eufora debit card can restore his
10 credit or improve his credit rating and it's a patent,
11 it's a process.

12 You're going to hear testimony from one of the
13 government's own witnesses, Eric Edenholm, who will tell
14 you that in 2003 he invested \$250,000 in Eufora by which
15 he then obtained an ownership interest in the company and
16 18 to 20 months later sold his shares, his ownership
17 interest in the company for 420 to \$430,000. That's a nice
18 return on an investment.

19 The indictment goes on to say that Kenner and
20 Constantine then unlawfully diverted investor money for
21 their personal benefit.

22 There, ladies and gentlemen, is a fundamental
23 disagreement between the government and the defense as to
24 whether or not an individual who has an ownership interest
25 in a private company and decides to sell that ownership

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1 interest, or a portion of that ownership interest to
2 another person, commits a crime when he uses that money
3 for personal purposes. Let's say to pay the kids -- his
4 kid's tuition bill. That's not what happened here.

5 The allegation is that Mr. Constantine used it
6 for various purposes, yes, and indeed, ladies and
7 gentlemen, what we have is we have the investor paying
8 money to a person that holds an investment in a privately
9 held company commonly known as a private placement, the
10 money goes into the individual owner, he then conveys a
11 percentage of his ownership interest to the investor and
12 the value of the investor gets his ownership interest. It
13 need not be used for specifically business purposes under
14 those circumstances.

15 However, when it came to the activities of Tommy
16 Constantine, there was the misuse of some of that money,
17 and indeed what transpired is an attorney by the name of
18 Michael Stolper, with Phil Kenner's assistance, conducted
19 an investigation on behalf of those investors in Eufora
20 into Tommy Constantine's activities.

21 One of the major parts of that investigation
22 involved Tommy Constantine's mismanagement of Eufora.

23 What do I mean by that? What I mean by that is
24 those investors that were clearly sending money to Tommy
25 Constantine for a percentage interest in Eufora, part of

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1 what he owned, Tommy was not reflecting that or causing
2 persons in Eufora to reflect the fact that his ownership
3 interest was now being diminished by way of the sale of
4 that interest to others. It ought to be reflected on the
5 books and records.

6 There was concern about Tommy Constantine's use
7 of the corporate credit card that became part of the
8 Stolper investigation.

9 And as you'll see in e-mails where Phil Kenner
10 was copied, Stolper detailed the efforts he was making in
11 investigating Tommy Constantine to various individuals,
12 including William Ranford who will be testifying as a
13 government witness, Steve Rucchin who will be testifying
14 as a government witness. Michael Peca who will be
15 testifying as a government witness, and Nick Privitello
16 who will be testifying as a government witness and others.

17 And indeed in an e-mail again where Phil Kenner
18 was copied because he was part of that investigation,
19 tough to be a coconspirator when you're involved in an
20 investigation of your alleged coconspirator before you're
21 even charged with a crime. The Judge told you the
22 indictment is not proof of anything.

23 There's an e-mail from Stolper dated June 28,
24 2011, again a copy to Kenner, which updated the lawsuit
25 against Constantine in Arizona so all the investors knew

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1 where they were in terms of that investigation of Tommy
2 Constantine.

3 But there's more. Because Tommy Constantine
4 runs out of money at some point and the proof will show
5 that he files a petition in bankruptcy in Arizona, and
6 when he files that petition in bankruptcy, when you're
7 required to list the debtors who you owe money to, he
8 doesn't list any of the hockey player investor clients of
9 Phil Kenner and claims in that Arizona bankruptcy
10 proceeding that he never had an ownership interest in
11 Eufora.

12 Of course he did, ladies and gentlemen. The
13 books and records which were ultimately reconstructed by
14 two people, C.R. Gentry and Timmy Gaarn, as you will hear
15 ultimately reflected everyone's owner interest, Rucchin
16 and all the others.

17 But when Tommy Constantine files a petition in
18 an effort to avoid those obligations, a bankruptcy
19 petition, Phil Kenner himself and assists other investors
20 file a claim challenging Tommy Constantine's disavow of
21 ever having an ownership interest in Eufora.

22 And within Phil's petition to the Court, as well
23 as others, including one specific investor client they say
24 as follows:

25 Under Constantine's fraudulent claim that he was

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1 not a shareholder of Eufora since his alleged pledged
2 transfer to Sue Ellen Ferguson, trustee, 2002 trust in
3 April 2003, upon information and belief the undersigned
4 believes Constantine personally sold shares in Eufora as
5 follows:

6 Sergei Gonchar 2/29/2008, \$100,000; Mattias
7 Norstrom on 3/19/2008, \$100,000; Michael Peca on 4/7/2008,
8 \$100,000; Tyson Nash on 4/24/2008, \$100,000; Greg De Vries
9 on 6/2/2008, \$75,000; Darryl Sydor on 7/7/2008, \$50,000;
10 William Ranford on 7/7/2008, \$200,000; Glen Murray on
11 7/21/2008, \$50,000; and Vitali Yachmenev on 8/8/2008,
12 \$25,000.

13 How is Phil Kenner a coconspirator with Tommy
14 Constantine with reference to either the Global Settlement
15 Fund or Eufora when he's taking these actions to protect
16 his investors long before he's charged with a criminal
17 offense.

18 Now, when I sit down, Mr. LaRusso, Constantine's
19 attorney, will have his opportunity to address you, ladies
20 and gentlemen.

21 There's reasons there's separate lawyers in this
22 case and you're going to have to decide this case as his
23 Honor told you with reference to the proof separately and
24 distinctly as against each defendant. Even though the
25 government loves that word conspiracy and puts it into the

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1 indictment, see if the proof bears out conspiratorial
2 conduct of a criminal nature.

3 Now, Mr. LaRusso may or may not accuse Phil
4 Kenner of crimes or misdeeds. We have absolutely taken
5 the position that Mr. Constantine acted not entirely
6 appropriately I guess in terms of GSF or Eufora. But
7 Tommy Constantine does have a predilection to be evasive.

8 And what do I mean by that? In paragraph 14 of
9 the indictment it reads:

10 It was further part of the scheme to defraud
11 that between November 2009 and December 2009, the
12 defendants Kenner and Constantine convinced John Doe 11,
13 and that's Nick Privitello by the way, to invest money in
14 Eufora in exchange for an ownership interest in the
15 company.

16 The defendant Constantine then unlawfully
17 diverted certain monies for unauthorized purposes,
18 including for his personal benefit and disavowed John Doe
19 11's -- Privitello's -- ownership interest in Eufora.

20 That is hands-down true. Nick Privitello, as
21 the proof will show, gave Tommy Constantine \$200,000 on a
22 clear and explicit promise from Tommy Constantine that he,
23 Nick Privitello, would receive an ownership interest in
24 Eufora.

25 There's going to be a tape recording that you

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1 will hear and I expect the proof to show where Nick
2 Privitello secretly records a conversation with Tommy
3 Constantine where he says, in substance, Tommy, I gave you
4 \$200,000. Where's the proof of my ownership interest?
5 Now, I'm paraphrasing.

6 And when Tommy Constantine says on that tape in
7 substance I don't know what Kenner and Kaiser are telling
8 you, but they're the culprits.

9 Well, Nick Privitello knew that evasive answer
10 from Tommy Constantine was untruthful, but he let Tommy
11 talked.

12 The government charges --

13 MR. MISKIEWICZ: Your Honor, I'm sorry to do
14 this. May we approach?

15 THE COURT: Yes.

16 (Continued on next page.)
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1 (The following takes place at sidebar.)

2 MR. MISKIEWICZ: We have made very careful
3 redactions of all these recordings to exclude any
4 references by one defendant shifting blame to the other
5 consistent with Bruton.

6 Mr. Haley has just introduced exactly what
7 Bruton forbids and it's not even going to come into
8 evidence.

9 I know I hear him promising the defendant's
10 going to take the stand, and maybe at the end of the day
11 that will solve a lot of these issues, but I mean he's
12 running so close once again to creating grounds for a
13 mistrial that I'm just -- I'm sorry for not being able to
14 articulate anything clear than that, but it's outrageous.

15 MR. LA RUSSO: I move for a severance of my
16 client. When we first brought this up to the Court --

17 THE COURT: Let's take the lunch break.

18 MR. LA RUSSO: Okay.

19 MR. HALEY: I know your Honor will give me the
20 opportunity to respond.

21 THE COURT: How much more do you have on your
22 opening?

23 MR. HALEY: Probably 15 minutes, Judge. I'm
24 reaching the end.

25 THE COURT: Okay.

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1 (The following takes place in open court.)

2 THE COURT: Members of the jury, it's 12:35.

3 This will take a few minutes, so it makes sense for you to
4 take your lunch break now and we will reconvene at 1:45.

5 Don't discuss the case. Have a good lunch.

6 (The jury is excused.)

7 THE COURT: Be seated.

8 Go ahead, Mr. LaRusso.

9 MR. LA RUSSO: Your Honor, I make my application
10 for a severance on two grounds.

11 As the Court heard from Mr. Miskiewicz, the
12 information that was coming off of that tape regarding
13 comments that my client made where my client is unable to
14 cross-examine the individual and is being castigated for
15 comments that were made by another individual.

16 In addition, judge, more importantly I think is
17 the fact that I had moved for a severance because we felt
18 the evidence was going to clearly show that one position
19 taken by one defendant is diametrically opposed to the
20 position taken by another and that the jury, if they
21 believe one, necessarily will then have to convict the
22 other party.

23 I think what Mr. Haley has done it in three
24 aspects; where he talks about Eufora and my client's
25 misuse of money, where he talks about the misuse of the

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1 credit cards and goes in depth as to what the evidence
2 will show from his point of view, we are taking the
3 diametrically opposed position that he has just laid out
4 to this jury.

5 In addition, your Honor --

6 THE COURT: When you say diametrically opposed
7 position, what's your client's position with respect to
8 those credit lines?

9 MR. LA RUSSO: It was absolutely no misuse,
10 judge. No misuse whatsoever.

11 THE COURT: That's not inconsistent. The jury
12 can believe that Mr. Kenner had nothing to do with those
13 diversions, but also believe your position that there was
14 no misuse, right? Those aren't diametrically opposed.
15 They're consistent with each other potentially.

16 MR. LA RUSSO: I find it hard to believe that
17 where one person gets up and says he stole the money, and
18 my client says he didn't steal the money, that the
19 positions aren't diametrically opposed.

20 And I assume that Mr. Haley in good faith made
21 an opening remark that he thinks he can prove.

22 What I'm saying to the Court is that when the
23 jury hears Mr. Haley's alleged proof, it's going to
24 necessarily mean my client is responsible. Then they hear
25 my client's proof and they're not going to find it. It's

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1 going to be the opposite dovetail against Mr. Kenner's
2 false accusations he's making against my client.

3 Judge, I don't know how I can in good conscience
4 at this point get a fair trial, and this is what's very
5 disturbing.

6 Mr. Haley, and to his credit, told me many
7 months ago that he's going to be a second prosecutor.

8 I'm listening to his final remarks and I thought
9 that was a prosecutor's opening and instead it's the
10 codefendant who is accusing my client in graphic detail of
11 misuse and theft that the jury has to find upon and make
12 decisions.

13 I don't know how my client can get a fair trial
14 under those circumstances. More so, they now heard about
15 information they may never even hear that violates Bruton.

16 Judge, I don't know how far this is going to go.
17 There are other tapes which are clearly inadmissible where
18 Mr. Kenner may be a party to them where he implicates my
19 client in all kinds of thefts, misappropriations and that
20 would violate Bruton.

21 Judge, I think under these circumstances I renew
22 my application for a severance under the prejudicial
23 aspects.

24 THE COURT: Mr. Miskiewicz.

25 MR. MISKIEWICZ: On the issue of severance, we

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1 again oppose.

2 The fact is Mr. Haley made representations and
3 promises about the defendant taking the stand and I assume
4 that he is going to -- I assume that what he's relating to
5 is what he intends his client is going to say on the stand
6 and that would not be a violation of Bruton because the
7 codefendant would have the opportunity, as the government
8 would, to cross-examine him.

9 There were other items though that are clearly
10 from our perspective hearsay, the references to the e-mail
11 in which again Mr. Kenner is allegedly updating victims.

12 I don't know what Mr. Kenner is going to say. I
13 didn't object to that specifically but it sounds like he
14 is both mixing a lot of what he anticipates Mr. Kenner is
15 going to say with things that are frankly just going to be
16 inadmissible hearsay, including the Home Depot tape,
17 including other things.

18 And the reason I got up at the moment I did was
19 he is almost promising what one of our witnesses is going
20 to say and I want the Court to understand and I want the
21 record to reflect we do not intend to offer any of this
22 Brutonized testimony.

23 And to the extent he's offering that as hearsay
24 in violation of Bruton, it seemed like an appropriate
25 moment to object to his opening.

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1 Once again, his opening is what it is. It's his
2 words and that's it and they've already been instructed
3 that it's not evidence.

4 But for him to continuously promise things and
5 almost shift that to the government, as if the government
6 is going to produce these things, I felt at that
7 particular moment I had to say something and halt it.

8 Beyond that, what's occurred does not prejudice
9 any specific trial right of Mr. Constantine or anybody
10 else because the government is not the one who is throwing
11 these monkey wrenches in as far as promising things that
12 frankly I'm sure the Court will deal with while the trial
13 is going on when we object to the introduction of material
14 that is frankly hearsay.

15 THE COURT: You are going to introduce the
16 redacted version of that tape; is that your intention?

17 MR. MISKIEWICZ: Yes.

18 And we already prepared what the redactions
19 would be and there's no references to one. It goes both
20 ways. There are tapes in which Mr. Constantine blames
21 Kenner for everything and there are other tapes where it's
22 vice versa. We have sanitized or Brutonized, if you will,
23 statements so we have relatively short clips that
24 constitute from our view admissions of the defendants and
25 that's it.

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1 THE COURT: Okay. Mr. Haley.

2 MR. HALEY: Your Honor, I'm not bound by Bruton.

3 My obligation is to present what I believe to be
4 a viable defense on behalf of my client, and that defense
5 includes distancing himself from allegations of being a
6 coconspirator with Tommy Constantine with reference to
7 specific allegations in the indictment.

8 If the government says there's going to be a
9 Bruton issue, your Honor, and they don't introduce that
10 part of the tape that I believe is of assistance to my
11 defense, then I will move to introduce that part of the
12 tape.

13 I might say, judge, I did -- I don't have a
14 transcript -- but I did very early in this proceeding,
15 maybe my first appearance based upon my review of the
16 evidence that I had seen to date, alerted the Court,
17 alerted the government and alerted Mr. LaRusso that I
18 was -- it was going to be part and parcel of this defense
19 based upon the evidence that I saw that would be
20 antagonistic to the position by Mr. Constantine.

21 So that's my position, judge, although I don't
22 believe the answer is that the defendant Constantine --
23 excuse me -- I don't believe the answer is that the
24 defendant Kenner is thereby shackled because of Bruton
25 issues. That's clearly not the case.

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1 Thank you, judge.

2 MR. MISKIEWICZ: May I reply just briefly, your
3 Honor?

4 THE COURT: Yes.

5 MR. MISKIEWICZ: I'm not suggesting he be
6 shackled, but I'm suggesting that the rules of evidence
7 will control and if it's hearsay your Honor will rule on
8 it. But to promise things that are obvious hearsay as if
9 they're going to come in here is inappropriate and that
10 was the basis of my objection most recently at sidebar.

11 MR. HALEY: May I be heard, judge?

12 The alleged hearsay is a tape recorded
13 conversation between Nick Privitello and Tommy Constantine
14 that discusses a specific allegation as set forth in the
15 indictment. It's an admission of a defendant. It's not
16 hearsay, judge.

17 THE COURT: Okay.

18 I'm denying the application for severance for
19 two reasons.

20 The first is again, and I'll write a written
21 decision on this, the case law is clear that because two
22 defendants are finger pointing at each other and blaming
23 each other for misappropriation, diversion of money, does
24 not itself warrant severance.

25 In this case I continue to conclude that the

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1 jury can believe at the same time that Mr. Kenner had
2 nothing to do with the diversion of funds and
3 Mr. Constantine who was taking those funds and using them
4 in various ways, but at the same time conclude based upon
5 the evidence in the case that he was permitted to use them
6 pursuant to the agreements that he had with the investors
7 in the way that apparently the documents or the evidence
8 and testimony is going to suggest that he utilized it.
9 They're not inherently inconsistent.

10 And the fact that one defense lawyer may be
11 pointing the finger at another defendant in an opening
12 statement is not a sufficient basis for a severance.

13 The Bruton issue is a bigger concern and I have
14 not confronted a situation where a defense lawyer on his
15 own decided that the redactions for Bruton purposes didn't
16 apply to him.

17 But I do believe based upon your opening
18 statement that Mr. Kenner is going to testify and the
19 Bruton issue is going to be cured by that, Mr. LaRusso.

20 If Mr. Kenner in fact testifies -- I don't
21 understand -- doesn't that fully protect your ability to
22 question Mr. Kenner to the extent Mr. Kenner is pointing
23 the finger at you, you'll get a chance to cross-examine to
24 see if he has any evidence of that.

25 MR. LA RUSSO: If that's the case, judge, then I

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1 do have the opportunity. That's correct. It's only the
2 out-of-court statement if the witness did not testify. I
3 put my concern on the record.

4 THE COURT: All right.

5 Mr. Haley, in the future, if you're going to
6 make reference to any statements that have been redacted,
7 I want you to advise both the court and the government
8 that you're going to do that.

9 Despite your view these are going to come in,
10 they may have a different view. Maybe I think it's
11 hearsay and it's not supposed to come in, and by you
12 referencing it, even if your client testifies, if it's
13 hearsay and shouldn't come in, you're creating a problem
14 in a five week trial because you make a determination it's
15 not hearsay or it falls within one of the exceptions to
16 the hearsay rule.

17 As we move forward in the case, if the
18 government has redacted something because there's a Bruton
19 issue, before you make reference to it either in opening
20 statement or to a witness, you should ask the Court for
21 permission to do that because you're creating a potential
22 mistrial to the fact it's hearsay and if your client
23 testifies and I'll rule it's hearsay --

24 MR. HALEY: Judge, I don't know specifically
25 what the Government is referring to. I'm aware of a

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1 specific conversation between Nick Privitello and Tommy
2 Constantine and I paraphrased how the recording begins.

3 THE COURT: You're referring to a different
4 thing. You made reference to an e-mail where your client
5 blames Mr. Constantine.

6 MR. HALEY: Yes, sir.

7 THE COURT: That sounds like hearsay to me.

8 MR. HALEY: Your Honor, if my client testifies,
9 as he will, and if look we made that determination a long
10 time ago. If my client testifies, as he will, as to what
11 he uncovered when he determined there were
12 misappropriation of the goods, funds, and then took an
13 effort to alert his clients as to his view of that
14 misappropriation by way of an e-mail, that's not hearsay,
15 judge.

16 THE COURT: Maybe it is and maybe it isn't. If
17 he sent that e-mail yesterday that would be a problem,
18 wouldn't it? It depends on the timing of the e-mail, the
19 circumstance of the e-mail.

20 All I'm saying is if the government started
21 introducing things that creates a potential problem for
22 your client, I'm sure you would not be happy either.

23 Obviously there's two defendants. We have to
24 make an effort to protect the rights of both defendants.
25 I'm not saying that you're not going to be able to

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1 introduce a particular e-mail or recording.

2 All I'm saying is I think it's fairly obvious
3 when you have constitutional rights of two defendants
4 involved, that the government gives you a piece of
5 evidence that has been redacted for Bruton purposes or
6 there's some other piece of evidence that would
7 potentially be hearsay, that before you blurt it out in
8 front of the jury, that you ask the Court's permission for
9 a ruling so that either Mr. LaRusso or the government has
10 time to object. Obviously it could turn out to be wrong.
11 We would have a big problem, okay?

12 MR. HALEY: One final comment. And thank you.
13 I didn't take anything out of context. That particular
14 statement I read is indeed not taken out of context. It's
15 part of the search warrant that's already on record.

16 And with all due respect to the Court, Judge,
17 and I like to try to defend my client, but I also like to
18 defend myself, your Honor.

19 This is an opening statement. This is what I
20 anticipate in good faith in my opinion the proof will
21 show. If I'm wrong on that, I don't believe I will, your
22 Honor will make a determination. If it goes in, then it
23 goes in. If it doesn't go in, then we create an issue on
24 appeal if there's a conviction, Judge.

25 THE COURT: Let me make clear what my direction

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1 to you is.

2 My direction to you is as follows:

3 If you're about to blurt out statements that
4 your client made in e-mails on tapes about Tommy
5 Constantine, I'm telling you I want you to raise it with
6 me first because you may turn out to be wrong.

7 It isn't that Mr. Haley says whatever he wants
8 to the jury about what the evidence will be, whether it's
9 hearsay, whether it's a Bruton problem and then if you
10 turn out to be wrong, we will do the trial over again.

11 Other people in the courtroom have an
12 opportunity to object. I hold the government to the same
13 standard. If they were to do something like that, they
14 would be in a lot of trouble.

15 That's all I'm saying. If you are going to make
16 reference to something your client said in the past that
17 implicates Mr. Constantine, I want you to highlight it to
18 the Court so I can give everybody a chance to object and
19 maybe I'll rule that it's not coming in, okay? That's all
20 I'm asking you to do. I don't think that's asking a lot
21 of an attorney in a criminal case.

22 MR. HALEY: It's not, Judge, and I simply say we
23 did. That specific e-mail has been a topic of
24 conversation for a long time. So it's not like that was
25 hidden. That's the only one I referred to. There are

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1 multiple others. That's the only one I referred to.

2 THE COURT: I remember last week, if it's the
3 same e-mail I'm remembering, last week we had a discussion
4 about it and Mr. LaRusso said, judge, I'm concerned about
5 this e-mail.

6 And I think, if my memory is correct, and we can
7 have the Court Reporter pull up the transcript, I said
8 it's not clear to me that's not coming in. That sounds
9 like it could be hearsay. We're speculating as to what's
10 coming in.

11 That should give you some clue that potentially
12 your position it's not hearsay would not necessarily be
13 one that I would reach when I said on the record last week
14 it sounds like it may be hearsay.

15 In the future I want to make sure you understand
16 in any statements that he's referring to Mr. Constantine,
17 I want a chance to rule on it, okay?

18 Let's take the lunch break. Try to get back at
19 1:45.

20 Thank you.

21 MR. MISKIEWICZ: Thank you, your Honor.

22 (A lunch recess is taken.)

23 (Continued on next page.)

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1 A F T E R N O O N S E S S I O N

2 THE COURT: Please be seated. Okay, we're ready
3 for the jury?

4 MR. MISKIEWICZ: Yes, your Honor.

5 MR. LA RUSSO: Yes, your Honor.

6 MR. HALEY: Okay, bring in the jury.

7 THE CLERK: All rise.

8 (Whereupon, the jury entered the courtroom.)

9 THE COURT: Everyone can be seated. Okay, I
10 hope everybody had a good lunch. We'll continue now with
11 Mr. Haley's opening statement.

12 MR. HALEY: Thank you, judge.

13 I am almost finished. If I may, ladies and
14 gentlemen, as relates to Eufora, another allegation in the
15 indictment read as follows:

16 It was further part of the scheme to defraud
17 that between December 2008 and May 2009 the defendant
18 Kenner convinced -- actually I'll substitute the John Doe,
19 Steve Rucchin, Bill Ranford to invest money in Eufora in
20 exchange for an ownership interest in the company. The
21 defendant Kenner directed Timothy Gaarn, an individual
22 whose identity is known to the grand jury, to convert
23 certain money for unauthorized purposes, including for
24 Kenner and Constantine's personal benefit.

25 The proof that we submit to you at trial, ladies

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1 and gentlemen, is that the relationship that Phil Kenner
2 had with Tim Gaarn was one that went back for some period
3 of time. And the proof that we maintain you'll see at
4 trial is that there were various occasions where
5 Mr. Kenner loaned Tim Gaarn money, and in return, Tim
6 Gaarn loaned Phil Kenner money. Tim Gaarn did have an
7 ownership interest in Eufora, and indeed when he sold his
8 ownership interest in Eufora and acquired investor money
9 for that, he did use that money which at that point in
10 time was his money to pay back some of the monies that he
11 received from Phil Kenner as a loan.

12 Now, the government has given a cooperation
13 agreement to Tim Gaarn. We submit to you, ladies and
14 gentlemen, the proof will show Tim Gaarn committed no
15 crime either individually, Tim Gaarn committed no crime
16 collectively for Phil Kenner or any other person and
17 without saying more you'll have an opportunity to
18 scrutinize that sweetheart deal that the government made
19 with Tim Gaarn to determine whether or not it was an
20 invitation for Tim Gaarn to say what the government wanted
21 to hear. But that will be your determination.

22 And I say whatever the government wanted to
23 hear, correct or not correct.

24 In that respect, you will hear evidence that
25 there was a lengthy telephone conversation recorded

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1 between my client Phil Kenner and Tim Gaarn where Tim
2 Gaarn had full and fair opportunity because it was
3 secretly recorded to talk to Phil Kenner about the crimes
4 they allegedly committed together. And he didn't take an
5 opportunity to question Phil about the crimes that they
6 committed together because they didn't commit crimes
7 together. But that will be something that you can weigh
8 at the conclusion of the case with reference to the
9 quality of the government's proof.

10 And let me just say this, ladies and gentlemen,
11 when it comes to the quality of the government's proof,
12 there are any number of secretly recorded conversations
13 between Mr. Kenner and other individuals and they are
14 legal. Whether or not they're deceptive or not you can
15 make that determination. And what do I mean by that? If
16 you have a dispute with an individual, the individual
17 calls you up, you're unaware that they're calling you up
18 and recording the conversation, so that they might perhaps
19 lull you into a sense of security, who knows, my point is
20 simply this, as the proof will show, neither of these
21 persons who secretly recorded the conversations with Phil
22 Kenner said something like look Phil you know that
23 dispute, I'd like to talk to you about it, I will record
24 the conversation and I will be the person that keeps that
25 recording in my sole and exclusive possession. Under

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1 those circumstances you might say you know, I really don't
2 want to have this conversation right now, because you're
3 being set up. But you'll make that determination.

4 There is a final allegation in the indictment as
5 relates to scheme to defraud. The government calls it Sag
6 Harbor the Led Better, I make you this promise, ladies and
7 gentlemen, I will address that allegation as my first
8 point in summation. You've indulged me at this point in
9 time, given me a great bit of your time to listen to what
10 I had to say, and I'm conscious of that indulgence.

11 So let me simply say this, we believe that at
12 the conclusion of the evidence here and the credible proof
13 as you believe it to be, Phil Kenner committed no crimes
14 as relates to Sag Harbor and Led Better.

15 I make you this promise in conclusion, I will do
16 all that I can to elicit all the information through the
17 questioning of witnesses, as well as present evidence to
18 you through the tell of my own client and others so that
19 you will have an opportunity to make a determination on a
20 full set of facts as relates to whether or not the
21 government has proven its case beyond a reasonable doubt
22 in terms of the alleged crimes as set forth in the
23 indictment. But I do have one request. And it's really a
24 request consist at that point with his Honor's
25 instructions to you, and that's that you withhold judgment

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1 until this case is completely concluded, which conclusion
2 involves the testimony of the defendant and his witnesses.
3 Thanks for listening to me.

4 THE COURT: Members of the jury, you will now
5 hear the opening statement by counsel for Mr. Constantine,
6 Mr. La Russo.

7 MR. LA RUSSO: Thank you, your Honor. Good
8 afternoon, ladies and gentlemen. There's an old saying
9 that I'm sure we're all very familiar with, that no good
10 deed goes unpunished. And this case, ladies and
11 gentlemen, is a perfect example of that.

12 My client is sitting at that table because he
13 made a terrible decision of trying to break up a fight
14 between two business associates whose names you've heard
15 during these opening remarks by both the government and
16 Mr. Haley, and those two business associates were Phil
17 Kenner, and Ken Jowdy, but he didn't just decide to do
18 this on his own voluntarily. He was asked to help by both
19 of them. They asked him to get involved, to see if he
20 could negotiate a settlement between them and to basically
21 try to stop two friends from gouging each other's eyes
22 out.

23 The evidence will show, ladies and gentlemen,
24 that Kenner had invested and/or lent Jowdy almost \$25
25 million of his clients' money. And Jowdy it seemed wasn't

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1 performing as he promised. Wasn't willing or able to pay
2 it back after eight years.

3 Mr. Constantine was asked to find a solution
4 that he -- that they could both agree upon and he spent
5 almost 18 months trying to find the solution, and what he
6 got in return was that both of his colleagues eventually
7 turned on him.

8 Again the two of them and their associates,
9 Mr. Constantine was sued over ten times in three states,
10 over a five-year period. By the way, each and every one
11 of these lawsuits except for one which is still pending
12 was dismissed and in some instances they were even ordered
13 to pay legal fees. But when the lawsuits failed, with the
14 help of a certain former New York police officer,
15 Mr. Kaiser, and an investor, they took this failed civil
16 case of theirs and tried to make it criminal case.

17 Ladies and gentlemen, you will also hear that my
18 client actually cooperated with the government in many
19 aspects of this investigation, even disclosing a fraud
20 that took years for them to finally agree occurred, when
21 Mr. Gaarn came forward under his grant of immunity and
22 disclosed the fraud that he was involved in with the
23 codefendant Mr. Kenner.

24 Our evidence will show that certain information
25 that proves Mr. Constantine's innocence unfortunately was

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1 withheld from the prosecutor by Agent Galioto, I'm not
2 saying deliberately, but my negligence and by his
3 willfulness in not wanting to see where the truth would
4 have taken him. As a result, Mr. Constantine stands
5 there, sits there, has been wrongfully accused of a crime
6 and has been publicly humiliated, ladies and gentlemen,
7 makes no mistake, he's fighting for his life.

8 The evidence will show while Mr. Constantine was
9 trying to find a solution for his two colleagues,
10 Mr. Kenner and Mr. Jowdy, he uncovered what he then
11 believed to be some very disturbing information,
12 information that suggested that while Mr. Jowdy and
13 Mr. Kenner were pointing fingers at each other, as far as
14 Mr. Constantine was concerned, neither of them had clean
15 hands. And when he brought these facts to light,
16 including the hockey players, their attorneys and even
17 certain law enforcement agencies, he instantly became an
18 enemy to both Kenner and Jowdy. What happens? Jowdy was
19 accusing Constantine and Jowdy and Constantine was
20 accusing Jowdy and Kenner and his associates. It was
21 nothing short of a fiasco.

22 You will hear like Jowdy, Constantine also
23 worked with Kenner for many years. And he himself had
24 done multi-million dollar transactions with Kenner. And
25 by that point the evidence will show that Mr. Constantine

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1 had accomplished a lot, you've heard a little bit about
2 this. For example, Mr. Constantine founded an award
3 winning prepaid card company named Eufora, and actually
4 secured six United States patents. But the evidence will
5 show made this company very valuable and very desirable,
6 unlike Jowdy and literally everyone else with Mr. Kenner,
7 everyone with which Mr. Kenner had invested for that
8 matter, my client produced results.

9 But when they both attacked Mr. Constantine,
10 everything positive that he had ever done was either
11 destroyed or twisted something bad.

12 Now, you heard during the government's opening
13 they said that my client spent hockey players' money, I
14 think that I have this right, hockey players' money
15 portraying himself as a race car driver and that he hired
16 Playboy models.

17 Ladies and gentlemen, my client was sponsored by
18 several household named publicly traded companies and he
19 raised millions of dollars per year and one of those
20 companies was Playboy Enterprise.

21 A Hawaiian deal that you heard about both by the
22 government and Mr. Haley, Kenner, as it turns out and in
23 spite of many representations to the contrary, he was not
24 working alone or dealing with his own money. He had
25 investors, the hockey players, investors that

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1 Mr. Constantine only much later learned, I emphasize much
2 later learned had lines of credit that were used to make
3 these investments with Kenner. We're talking about
4 investors in lines of credit that Mr. Constantine wasn't
5 even made aware of until the litigation started many years
6 later. And the evidence will show that. As you start to
7 see through the witnesses and the documents that are
8 introduced, the timeline when these lines of credit again
9 will be clear to you and the evidence will also be clear
10 as to when my client finds out about it, many, many years
11 later. Let me make it very clear, the evidence will show
12 that Mr. Constantine did not knowingly participate in any
13 way in the creation or use of these lines of credit.

14 My client actually had a former police officer,
15 I mentioned earlier, John Kaiser, and he was a person he
16 had never met before, one of the investors in the Hawaiian
17 deal, knocking on his door one day and telling him that he
18 had invested a great deal of money in and now owned a
19 significant percentage of this prepaid card company. What
20 a surprise.

21 Money which he claimed came from his investment
22 in the Hawaiian deal. Nevertheless Mr. Constantine was
23 the only one of several actual consultants with Mr. Kenner
24 who was paying, who he was paying Mr. Constantine at the
25 time, that actually, this was proven through the evidence,

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1 successfully provided financing for the Hawaiian project.
2 That's client. Financing which actually saved the project
3 at that time from being lost. Financing which ultimately
4 led to a company some of you may have heard, Lehman
5 Brothers, later investing and which paid down the lines of
6 credit and even generated a return of the hockey players'
7 money, that's what my client did.

8 Incidentally, this initial financing also led to
9 Mr. Kaiser, and I emphasize this, being repaid nearly 100
10 percent of his investment. And you will hear him testify
11 about the millions that he lost. But when he testifies,
12 the evidence is going to show that during these
13 transactions he got back from that Lehman loan almost his
14 entire investment. An investment which he now claims was
15 lost as he stands shoulder to shoulder with the hockey
16 players who did ultimately lose their investments. That
17 ladies and gentlemen is what I call a hypocrite.

18 But let's talk about why the players actually
19 did lose their investments in their lines of credit.
20 You've heard a little bit about it. I'll try not to be
21 too into depth to lose you, I'll try to make it simple at
22 how it will be presented. The evidence will show that it
23 was not Mr. Constantine's consulting fees that he received
24 that depleted these lines of credit to the detriment of
25 the hockey players but, rather, it was the millions of

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1 dollars in loans made to Jowdy by Mr. Kenner which
2 remained unpaid and ultimately depleted these lines of
3 credit.

4 You may ask where is Mr. Jowdy in all of this.
5 Good question. Mr. Jowdy has been seemingly very crafty
6 about avoiding that seat right next to my client. You see
7 Mr. Constantine doesn't have a former director of the FBI
8 for 12 years as a close permanent friend and his attorney,
9 he doesn't have 10 retired FBI agents working security in
10 his business. He also doesn't have the ability to hire
11 and currently employ the government's two star witnesses,
12 Mr. Brian Berard and Mr. John Kaiser as employees and pay
13 them a hundred thousand dollar a year salary both of whom
14 will be testifying later this week for the government.

15 You see, that is what Mr. Jowdy and his friends
16 from the FBI have been able to do. They've been able to
17 deflect all the facts in this case and have somehow
18 miraculously avoided sitting here today by shifting the
19 blame. All this despite the fact Jowdy, not Constantine,
20 actually not Mr. Kenner, that received almost \$25 million
21 of the hockey players money, it is Jowdy that has not
22 accounted for any of this money to his investors,
23 purported victims in the case, and let alone provided a
24 penny in return on their investments except of course to
25 Kaiser and Berard in the form of a salary.

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1 In fact, the government will try to convince you
2 that Mr. Jowdy is also a victim of what is referred to and
3 you've heard it mentioned, the global settlement fund.
4 And that it was somehow used as a mechanism to defraud the
5 hockey players.

6 The evidence is going to show, ladies and
7 gentlemen, and you're going to hear it from the testimony
8 of multiple witnesses, that this fund was not solely
9 create for the lawsuit against Mr. Jowdy. I emphasize
10 that. There were multiple purposes. It was created to
11 preserve certain aspects in witness players had invested
12 utilizing various methods to pursue and defend various
13 legal actions, including Mr. Jowdy for his wrongdoings,
14 and that all the funds were used for their disclosed and
15 intended purpose.

16 None of the investors, ladies and gentlemen, in
17 this fund complained about how these funds were used at
18 the time. And the evidence will show that a number of the
19 investors were actually praising the results of various
20 actions unrelated to any legal action against Jowdy and
21 the evidence will prove that. But the government hasn't
22 told you and what the evidence will show is that 14 of the
23 19 hockey players who participated in the fund are still
24 suing Jowdy today, from the government's case as victims.
25 Let me explain that for a moment. Approximately 15 hockey

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1 players contributed between 300,000 and -- I'm sorry,
2 50,000 and 300,000, each into his so-called global
3 settlement fund, yet the evidence will show that many of
4 these hockey investors not listed as victims in the
5 indictment.

6 You will hear testimony from at least one of the
7 hockey players who was an investor who does not agree with
8 the government's characterization of Mr. Constantine or
9 the government's version of what happened with this fund,
10 and in fact believes Agent Galioto is protecting Jowdy.

11 Let me be clear on that point, ladies and
12 gentlemen. The evidence will show that the government's
13 own victim did not agree with their case. The evidence
14 through witness testimony and e-mails is going to show you
15 this: Each participant, the hockey player investors, was
16 well aware of the multiple purposes of the global
17 settlement fund and approved the uses of the fund in
18 advance and in writing or by way of e-mails. Each
19 participant was invited and most of these hockey players
20 actually participated in scheduled monthly conference
21 calls for regular updates from Mr. Constantine. Each and
22 every participant in the fund was sent regular e-mails
23 detailing updates and aspects of the strategy for which
24 the global settlement fund was initiated for.

25 Now, you heard from Mr. Haley say that Tommy

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1 Constantine misappropriated funds from the global
2 settlement fund. The evidence is going to show that in
3 several instances in which Mr. Constantine was
4 scrutinizing the use of the funds, for example, the
5 evidence will show that in one instance Mr. Kenner
6 submitted an expense report which totaled 30,000, and it
7 was Mr. Constantine that e-mailed Mr. Kenner and pointed
8 out that he had dinners and nightclubs on the expense
9 report and that this was inappropriate.

10 Ladies and gentlemen, let me make that clear.
11 My client was protecting Mr. Kenner's clients, the NHL
12 players, from their on advisor. The evidence will show
13 that as a result of Mr. Constantine's securitization of
14 Mr. Kenner's proposed use of the funds, that expense
15 report was reduced by several thousand dollars as a direct
16 result of my client's integrity in the matter.

17 Another instance. Mr. Kenner, as the evidence
18 will show, wired \$100,000 from one of the hockey player
19 investors, his name is Mr. Ranford from Mr. Ranford's
20 account into the global settlement fund. And when
21 Mr. Constantine noticed the inbound wire and realized that
22 neither he nor Mr. Kenner had prior written authorization
23 from Mr. Ranford to use the money, as he had received from
24 each and every other money player investor who
25 contributed, he told him, stating the proposed use of the

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1 funds, it was my client, Mr. Constantine, who insisted
2 that Mr. Kenner actually send the money back to
3 Mr. Ranford which the evidence will show it did go back,
4 solely because my client's integrity and his involvement.
5 So Mr. Constantine was taking particular care to ensure
6 that if any money is coming into that global settlement
7 fund, the individuals have to follow the protocol and be
8 sure that they let individuals know -- that they let
9 Mr. Constantine know that they are unaware of what the
10 money is being used for.

11 You know, in these types of cases ladies and
12 gentlemen we often hear, and I'm sure you're familiar with
13 this phrase follow the evidence, follow the money. But
14 the evidence will show that if the government followed
15 these two things in this case it would not be
16 Mr. Constantine sitting here and the government would have
17 a whole lot of support for its unreported victims. Our
18 evidence will show that it was Jowdy's misappropriation of
19 funds and his failed golf projects which has resulted in
20 tens of millions of dollars of losses to the NHL players
21 and it is Jowdy and the friends and family that have bee
22 the primary beneficiaries of the 12 -- \$25 million
23 investments lost by the NHL players, not Mr. Constantine.

24 But the government doesn't want you to know is
25 that 14 of the NHL hockey players that have invested with

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1 Mr. Jowdy, continue to sue Mr. Jowdy as we sit here under
2 the pretense that the global settlement fund was created
3 even after the government made it clear its allegations
4 against Mr. Kenner and Mr. Constantine, in other words,
5 they're not arguing merits of the lawsuits, per se, ladies
6 and gentlemen. What we are saying is that if the players
7 are still suing Jowdy, how could the government claim my
8 client fraudulently induced the players to sue Jowdy when
9 they are still doing it on their own.

10 I told you a little bit about the background and
11 how my client got here. Let me tell you why.

12 The evidence will also show that this case was
13 ultimately brought against my client primarily due to
14 certain misconduct, including the withholding and
15 misconstruing of certain evidence and facts by Agent
16 Galioto, specifically, that Agent Galioto has continually
17 shown bias and has blatantly disregarded facts that he
18 either well was aware of or should certainly have been
19 aware of. After all, it is his job. He is an agent in
20 the complex crime division of the FBI. But it appears the
21 hockey players are right about him protecting Jowdy and he
22 seemingly has it in for Mr. Constantine. For example,
23 ladies and gentlemen, the government made specific
24 allegations when they indicted my client and even went so
25 far as painting so-called victims such as Mr. Kaiser in a

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1 positive light.

2 You will hear a lot of testimony about what will
3 be referred to as a \$700,000 Eufora fraud. But in respect
4 to that particular fraud which occurred in 2009, the
5 government's own evidence will show that Mr. Kaiser
6 himself received 70,300 of the alleged 700,000 fraudulent
7 proceeds. But at Kenner's direction, Kaiser immediately
8 sent the money back to Kenner. Thus, attempting to
9 cleanse Mr. Kaiser of any wrongdoing. What the government
10 didn't mention or what the evidence will show is that
11 Mr. Kaiser received an additional \$105,000 of the \$700,000
12 proceeds, which he kept. And let me be clear ladies and
13 gentlemen, Mr. Constantine who at the time believed
14 wholeheartedly that a fraud had been committed was the
15 whistle-blower for this particular alleged fraud.

16 So when you hear of this \$700,000 fraud, there's
17 a conspiracy ongoing and you will hear that from the
18 government's own case. But what will the fraud actually
19 show you? I don't believe anyone told you that what the
20 evidence will show, but that Kenner received from that
21 over \$300,000.

22 The government witness, an admitted
23 co-conspirator Tim Gaarn, who, by the way, was granted
24 immunity as you know and is not facing criminal charges,
25 he received 60 for his end. The government witness and

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1 so-called victim John Kaiser he got the total 105 of the
2 175, and then he returned some of it. And then there's
3 another government witness you're going to hear about,
4 Mr. CR Gentry, he was the former CEO of Eufora. He
5 testified and quite a tale he spins. A man
6 Mr. Constantine fired for this reason, because he himself
7 was involved in the fraud on Eufora. And he was the one
8 that made it all happen. All of this while
9 Mr. Constantine -- he did receive money -- two \$500
10 payments directly and indirectly 20,000 which the evidence
11 will show was money owed to him by Mr. Kenner, not
12 diverted funds, but money owed by Mr. Kenner, without any
13 knowledge of the source of the funds.

14 Ladies and gentlemen, the evidence is also going
15 to show that my client was not really involved in an
16 elaborate criminal conspiracies you've been hearing. He
17 was not in this with Mr. Kenner to steal millions of
18 dollars since 2002 as alleged. The evidence will show
19 there was no big payday for Mr. Constantine from that
20 \$700,000, certainly not the level the government alleges,
21 which would make him the number two in the scheme in the
22 waterfall money, the evidence will show that he did not
23 get nearly as much as Kaiser or Gaarn, as a matter of fact
24 the evidence will show that even former New York Islander
25 Michael Peca got \$45,000 of it.

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1 Let me give a little more information just to
2 you understand and to illustrate why my client had nothing
3 with this alleged scheme. The evidence will show, and I
4 hope that I can simply present it to you as to the basis
5 of this \$700,000 fraud. The evidence will show that this
6 transaction actually started with a \$250,000 investment in
7 2002 which was made by an investor, another hockey players
8 into Mr. Jowdy's Mexican development.

9 Now, the records will show that this money was
10 then transpired from Mr. Constantine's prepaid card
11 company by Mr. Jowdy. At this point, ladies and
12 gentlemen, my client actually had unrestricted access to
13 this money as the company's CEO and could have paid him a
14 salary and taken it all, but you're going to find out he
15 didn't do. Instead, and the records will show, that
16 Mr. Constantine in fact didn't take a penny of it at that
17 time. But the government and apparently Mr. Haley would
18 like you to believe that he waited seven years as part of
19 this alleged conspiracy to receive two \$500 payments and
20 the indirect payment that I mentioned earlier that
21 Mr. Kenner was obligated to pay on Mr. Constantine's
22 behalf.

23 The government is also alleging, ladies and
24 gentlemen, that Mr. Constantine unlawfully diverted, and I
25 know you probably don't remember this being spoken about,

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1 \$200,000 investment made by a man by the name of
2 Mr. Privitello, which was intended for Mr. Constantine's
3 prepaid card company, specifically that he unlawfully
4 diverted Mr. Privitello's money to another company of
5 Mr. Constantine's name, a company called AC Falcon, which
6 is unrelated to Eufora. The government actually seized a
7 private jet which in fact belongs to one of the victims in
8 this case, who is our witness Serge Gonchar, he's actually
9 playing for Montreal in the playoffs right now. As we
10 began scrutinizing the government's evidence, they moved
11 the goalpost, they moved the goalpost.

12 What does that mean? They alleged something
13 different here. For example, they allege that
14 Mr. Privitello was not given his shares in the company,
15 but the evidence will show, however, that Mr. Privitello
16 neither asked for his shares nor his money back over a 10
17 month period because -- and this the evidence will be
18 clear on he was secretly working behind the scenes with
19 Mr. Kenner and his associates to attempt a hostile
20 takeover of Mr. Constantine's company. And Mr. Privitello
21 ignored repeated attempts by Mr. Constantine on behalf of
22 Eufora to accept a return on his investment in full. It
23 was part and parcel of a group that was trying to take
24 over the company. But the facts will show that this was
25 yet another instance where Agent Galioto either withheld

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1 or misconstrued the evidence which shows my client did
2 nothing wrong. Ladies and gentlemen, the evidence will
3 show that Agent Galimoto, I didn't understand this when we
4 first talked about it but I understand it now, ready,
5 fire, aimed, not ready, aimed and fired. Regardless,
6 Mr. Constantine was indicted for this without the
7 government so much as looking at the very bank statements
8 they subpoenaed in this case to see if these wires were
9 even accurate, which the evidence will show was not.

10 Now, I'd like to also address something
11 Mr. Haley mentioned about Eufora my client's bankruptcy,
12 this is easy. All the transactions Mr. Haley lists where
13 client sold his stock that occurred in 2008.
14 Mr. Constantine filed bankruptcy in 2012. And when he
15 filed bankruptcy in 2012 he, in fact, did not own any of
16 Eufora. And my client never stated that he at no point in
17 time owned a stake in Eufora. That's fiction presented by
18 Mr. Haley. The evidence will show my client simply stated
19 that at the time he filed bankruptcy he did not own any
20 shares, the truth.

21 Plain and simple, ladies and gentlemen, the
22 government, certainly Mr. Haley are wrong about this whole
23 case. But rather than acknowledge my client has been
24 wrongfully accused they have chosen to pivot their
25 theories to something entirely new, as we say to move the

Opening - La Russo

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1 goalposts. For example, it would be like saying it's
2 illegal to wear a red tie, I'm not wearing a red tie, well
3 then it's illegal to wear a green tie, I'm not wearing a
4 green tie, then it's illegal to wear whatever color tie
5 you're wearing. They've moved the goalposts as they've
6 proven their facts are incorrect and false.

7 Ladies and gentlemen, the evidence is going to
8 show that they didn't get it wrong just once, you may
9 recall Mr. Haley claiming that Mr. Constantine unlawfully
10 used the proceeds from the sale of his Eufora shares.
11 Well, he's wrong again. The evidence will show, and again
12 I repeat this multiple witnesses will testify, that it was
13 not stock which was owned by the company that was being
14 sold. But rather, stock in the company which was owned by
15 Mr. Constantine, a very significant distinction.

16 In other words, if you own a hundred shares of
17 Apple stock and you decided to sell it, you should not be
18 indicted for not giving the proceeds of that sale to
19 Apple. That's your stock to sell, and your money to spend
20 as you see fit.

21 (Continued on next page.)
22
23
24
25

Mr. LaRusso - Opening

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1 MR. LA RUSSO: The government is going to spend,
2 I imagine, a great deal of time and energy showing you how
3 my client spent his money. But the evidence will show it
4 was his stock to sell and his money to spend, not the
5 company's.

6 Ladies and gentlemen, the evidence will clearly
7 show that this is a fundamentally flawed indictment. By
8 the moving of the goalpost, the prosecution can only go so
9 far.

10 And during this trial the government will paint
11 Mr. Constantine with very broad strokes, generalities,
12 flawed allegations, and most importantly with less than
13 all the facts.

14 You know not surprisingly when you consider the
15 sources of the information of primarily unindicted
16 coconspirators are people on Jowdy's payroll.

17 Ladies and gentlemen, what the evidence will
18 show is that the ones that are pointing the finger at the
19 so-called bad guys, are in fact the bad guys.

20 But we will show you the truth with credible
21 witnesses that have not broken the law, cut deals with the
22 government or received any of the fraudulent proceeds and
23 we will do it in the finest detail under the hard evidence
24 to prove what is really going on here.

25 Ladies and gentlemen, you heard the Judge say

Mr. LaRusso - Opening

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1 it. The bottom line here is that the government carries
2 the burden of proof beyond a reasonable doubt that my
3 client knowingly and intentionally participated in these
4 alleged schemes and the fact is and the evidence will show
5 that he did not do such a thing. In fact, quite the
6 opposite.

7 The evidence will show that Mr. Constantine did
8 everything in his power to preserve the people's
9 investment and the moment he was made aware of what he
10 believed was any wrongdoing, he disassociated himself from
11 those he then believed were responsible and brought it to
12 the attention of the investors and law enforcement.

13 Thank you.

14 THE COURT: Members of the jury, that completes
15 the opening statements.

16 The government will now begin its presentation
17 of its evidence. I'll ask them to call their first
18 witness.

19 MR. MISKIEWICZ: The government calls Joe
20 Juneau.

21 THE COURT: Please come up to the witness stand
22 over here and remain standing once you get there for the
23 oath.

24
25

Juneau - Direct/Miskiewicz

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1 JOE JUNEAU,

2 called as a witness, having been first
3 duly sworn, was examined and testified
4 as follows:

5

6 THE COURT: Be seated.

7 Please state your name and spell it for the
8 record.

9 THE WITNESS: First name Joe, last name Juneau,
10 J-U-N-E-A-U.

11 THE COURT: Keep your voice up so we can all
12 hear you and stay close to the mike.

13 Mr. Miskiewicz.

14 MR. MISKIEWICZ: Thank you, your Honor.

15

16 DIRECT EXAMINATION

17 BY MR. MISKIEWICZ:

18 Q. Good afternoon, sir.

19 Mr. Juneau, what do you currently do for a
20 living?

21 A. For the past nine years I work as director and
22 coordinator of a youth development program.

23 Q. A youth development program in what capacity?

24 What do you do for that youth development
25 program?

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1 A. Pretty much using my experience and background in ice
2 hockey.

3 Q. What kinds of kids do you work with?

4 A. It's Inwood kids. Where I work is the north region
5 of the province of Quebec, so it's 14 Inwood communities
6 all separated and just developing this youth program for
7 these kids that don't have much.

8 Q. Prior to doing that, did you -- how long have you
9 been doing that?

10 A. Nine years.

11 Q. Prior to that, what have you done for a living?

12 A. I played professional hockey for 13 seasons in the
13 NHL.

14 Q. Okay.

15 When did you first join any team in professional
16 hockey, what year?

17 A. It was in February '92.

18 Q. And did you come out of some other league or did you
19 go to college prior to that?

20 A. I went to college in the U.S.

21 I went to RPI from '87 to '91.

22 And following my college years I went to play
23 for the Canadian Olympic team and ended up playing at the
24 Olympics in '92 for France.

25 Q. How did that work out?

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1 A. Pretty good. It's so far my best experience in
2 hockey by far.

3 Q. Did you win a metal?

4 A. Yes, we did.

5 We got the silver metal.

6 Q. You said you went to school in RPI.

7 Is that Rensselaer Polytechnic Institute?

8 A. Yes, it is.

9 Q. Is that in upstate New York?

10 A. Troy, New York.

11 Q. Do you have a degree from that school?

12 A. Yes, I do.

13 Q. A degree in what?

14 A. Aeronautical engineering.

15 Q. When you were at RPI, did you commute to the campus
16 or did you live on campus?

17 A. As a freshman and sophomore we had to live on campus.

18 Q. You lived in a dorm?

19 A. Yes.

20 Q. Do you know one of the defendants in this case
21 Phillip Kenner?

22 A. Yes, I do.

23 Q. How do you know him?

24 A. Well, we came together at RPI as freshmen.

25 Q. Were you roommates in the dorm?

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1 A. We did live in the same dorm the first year, and the
2 second year we lived in the same apartment.

3 Q. How would you describe your relationship with
4 Mr. Kenner at that time?

5 Were you just passing acquaintances or friends
6 or social friends?

7 A. Well, teammates and we became friends obviously.

8 Q. You played hockey for RPI?

9 A. Yes.

10 Q. That was before you joined team Canada in the
11 Olympics?

12 A. Yes.

13 Q. After you graduated from RPI, and after the Olympics,
14 did you sign onto a professional hockey team with the NHL?

15 A. Yeah.

16 I ended up signing my first professional
17 contract a few weeks following the Olympics.

18 Q. Who did you play for?

19 A. The Boston Bruins.

20 Q. So you moved to Boston?

21 A. Yes.

22 Q. Between the time you left RPI and the time that you
23 joined the Boston Bruins, had you maintained contact with
24 the defendant Mr. Kenner?

25 A. A little bit.

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1 From what I remember it was not easy, it was
2 hard. I was traveling a lot all over the world, training
3 very hard in Calgary and it was before all of the cell
4 phones and e-mails and all that stuff.

5 Q. Just for the record, did you sign on with the Boston
6 Bruins in approximately 1993?

7 A. I signed with Boston in I think it was in early March
8 if I'm right. I'm pretty sure I started playing in March
9 '92, so that would be like about a week after the
10 Olympics.

11 Q. Okay.

12 When you moved down to Boston and began playing,
13 did u reacquaint yourself with Mr. Kenner?

14 A. Yes, at some point.

15 I forgot how it actually happened at first, but
16 yes we did.

17 Q. Do you know what he was doing in Boston?

18 A. He was not in Boston.

19 I think he was actually working and living in
20 Florida.

21 Q. Do you know what he was doing for a living?

22 A. Not really.

23 My understanding is he was at Arthur Anderson
24 and working what he studied in at RPI.

25 Q. When you say Arthur Anderson, you mean the accounting

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1 firm?

2 A. I guess.

3 Q. Did there ever come a time that you invited him to
4 help you in some manner?

5 A. Well, yeah. I guess we cut a deal a few times and it
6 was good to see each other again.

7 And then what happened is it was the first time
8 of my life I was starting making important money, income,
9 and I felt very uncomfortable and not knowledgeable in
10 doing the proper things with investments and stuff.

11 Q. You said you got a degree, but you didn't get a
12 degree in any sort of financial field, correct?

13 A. Not at all.

14 Q. You didn't feel comfortable in terms of your own
15 financial knowledge as to how to do or what to do with the
16 money that you were earning at that stage?

17 A. That's it.

18 Q. So what, if anything, did you propose to Mr. Kenner?

19 A. I had met people in Boston in my first year playing
20 there and I came about knowing this individual who worked
21 for a firm there and after a discussion, finding out that
22 they would be interested to start some kind of a business,
23 so I proposed to show Kenner back then if he would be
24 interested in something like that, that I could introduce
25 him to these people and see if things would work out.

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1 Q. Do you remember the name of the company?

2 A. I think it was Boston Capital.

3 Q. And the person you spoke to, was that the CEO of
4 Boston Capital?

5 A. Eventually. But the first person I spoke to was
6 Derek Sanderson.

7 Q. Who is Derek Sanderson?

8 A. He was the play-by-play for the Boston Bruins and was
9 also a representative of Boston Capital.

10 Q. Is he a former NHL player?

11 A. Yes.

12 Q. From before or during the time you were playing?

13 A. Before my time.

14 Q. So do you know whether or not Mr. Kenner ever joined
15 Boston Capital?

16 A. Yes, he did.

17 I introduced him to these people and they
18 connected pretty good and eventually started.

19 Q. Did there ever come a time that you used Mr. Kenner
20 or Boston Capital to help guide you with respect to your
21 financial investments?

22 A. Yes.

23 That was one of my points, giving him an
24 opportunity to find something that he would be interested
25 in doing. It was obviously good as far as my interest. I

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1 just wanted to have someone helping me out, advising me
2 with the right things in respect to financial.

3 Q. Did Mr. Kenner become your financial advisor at that
4 point?

5 A. Yes.

6 Q. Again, what year are we talking about?

7 A. I think when all this was finally in place, if I'm
8 right, I think it started in the summer of '94 maybe.

9 Q. How long did Mr. Kenner remain your financial
10 advisor?

11 A. Until 2007, 2008 is like when we really disconnected
12 for good.

13 Q. Did there come a time that you fired him essentially
14 as your financial advisor?

15 A. Not by writing a letter or by him announcing. That
16 was not my approach at all.

17 Q. What was your approach?

18 A. Well, it became a time where I was put into a
19 different chance of investment or private deals.

20 It was towards the end of my career and became
21 very uncomfortable with things and then it was very hard
22 for me to actually contact. Besides e-mails it became
23 impossible to speak. He never returned calls and stuff.

24 And so eventually it became evident that a lot
25 of money that I had invested towards the end of my hockey

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1 career was lost in a way I guess.

2 Q. During this period of time you say you were unable to
3 reach him, were you still friends?

4 In other words, social friends not business
5 partners, but friends?

6 A. Well, there were times when an individual gains your
7 friendship and trust and you can't say in a short period
8 of time that this individual is not your friend anymore.

9 So, yeah, I can't say that it was one day, okay,
10 you're not my friend anymore.

11 Q. Mr. Juneau, were you at Mr. Kenner's wedding?

12 A. Yes, I was.

13 Q. Who was the best man?

14 A. I was.

15 We were pretty close.

16 Q. Was he at your wedding?

17 A. Yeah.

18 Q. Who was your best man?

19 A. He was.

20 Q. At the time that you began investing through Boston
21 Capital and using Mr. Kenner as your financial advisor,
22 can you describe for the members of the jury what kind of
23 investments or stock portfolio did you invest with
24 Mr. Kenner's help?

25 A. Well, what I wanted was to play my career and making

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1 money that was going to be invested in a smart way.

2 So knowing your career can be short, depending
3 how things go, injuries or whatever, I just wanted to be
4 safe with whatever was going to happen.

5 And so it was a mix of something like a
6 percentage that was safer and a percentage that was a
7 little more at risk. But overall it was something
8 pretty -- it was designed to be pretty safe so at the end
9 of my career I could -- you retire at 35. In my case I
10 ended up retiring at 36, so it's still a long way to go in
11 life.

12 Q. Is it fair to say that your investments were
13 principally stocks and bonds and things like that?

14 A. That's it, yeah.

15 Q. And did there come a time that Mr. Kenner moved to a
16 different investment company?

17 A. Yes, he did. A few times over the years.

18 Q. Did he move to a company called State Street
19 Investment?

20 A. Yeah. I'm not sure of the sequence. I think it was
21 from Boston Capital to State Street and then to I think it
22 was Freedom Capital and then to Assante, and then
23 essentially to what the business that he started on his
24 own.

25 Q. What was the name of the business that he started on

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1 his own?

2 A. I think it was called standard advisors.

3 Q. When he moved from these various places, did you
4 remain with him?

5 A. Yeah.

6 Q. He continued to be your financial advisor?

7 A. Yes, he did.

8 Q. Do you recall approximately when he and you began a
9 relationship in a company called Standard Advisors?

10 When did he become your financial advisor at
11 this company?

12 A. When Standard Advisors became?

13 Q. Approximately?

14 A. I think it was 2002 at some point.

15 MR. MISKIEWICZ: Your Honor, may I approach the
16 witness?

17 THE COURT: Yes.

18 The lawyers don't need to ask to approach the
19 witness, okay?

20 MR. MISKIEWICZ: Thank you very much, your
21 Honor.

22 (Exhibit handed.)

23 BY MR. MISKIEWICZ:

24 Q. Sir, I'm showing you what has been marked for
25 identification as Government's Exhibit 6016.

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1 I would like you to take a moment and look at
2 that and eventually turn to the signature pages and just
3 wait for my next question.

4 (Pause in proceedings.)

5 Sir, have you had a chance to look at the
6 signature pages which I think is indicated here to be page
7 5 of this document?

8 A. Yeah.

9 Q. Does that appear to be your signature? I realize
10 it's a copy. Is that your signature?

11 A. It appears to be, yes.

12 Q. Do you recall signing a document like this?

13 A. I can't say that I recall signing this one. I mean
14 it's possible but...

15 Q. Do you recall entering into any agreement with
16 Mr. Kenner and his company Standard Advisors to pay a fee
17 in exchange for the financial advisory services he was
18 providing?

19 A. From the get-go I do remember.

20 Obviously when we did set up at Boston Capital
21 over the years they were moving to State Street and moving
22 on to the other one. It was always presented as a better
23 place to be, a better percentage and all that stuff so I
24 just went along with it.

25 Q. My question is, did you agree to pay Mr. Kenner a fee

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1 in exchange for his financial advice at some point?

2 A. For me it was signing to be linked to a financial
3 bank. There's a few for that, yeah.

4 Q. Is this one of those agreements that you signed with
5 Standard Advisors and agreed to basically pay Mr. Kenner a
6 fee of some kind based on his consulting work for you?

7 A. Well, my understanding at the time was that there was
8 no difference. I was just signing with a different
9 company for the same kind of deal that again was presented
10 to me as a better place for me to have my investments.

11 Q. Okay.

12 So is that one of the agreements?

13 A. It looks like it.

14 MR. MISKIEWICZ: The government moves for the
15 admission of exhibit 6016.

16 THE COURT: Any objection?

17 MR. HALEY: No, sir.

18 MR. LA RUSSO: No, your Honor.

19 THE COURT: Government's Exhibit 6016 is
20 admitted.

21 (Government Exhibit 6016 in evidence.)

22 BY MR. MISKIEWICZ:

23 Q. And would you just look at the first paragraph.

24 When does this agreement become effective?

25 There's some handwriting in there, do you see that?

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1 A. It says April 2003.

2 Q. Does that agree with your recollection about when he
3 went over to Standard Advisors?

4 A. Yeah. I guess, yeah.

5 Q. Now --

6 THE COURT: Is this a good point to take a
7 break?

8 MR. MISKIEWICZ: Sure.

9 THE COURT: Let's take our afternoon break.
10 Don't discuss the case.

11 (The jury is excused.)

12 (Recess taken.)

13 (Continued on next page.)
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1 (Following a recess.)

2

3 THE COURT: Please be seated.

4 We are bringing in the jury.

5 THE CLERK: All rise.

6 (Jury enters the courtroom.)

7 THE COURT: Please be seated.

8 Go ahead, Mr. Miskiewicz.

9 BY MR. MISKIEWICZ:

10 Q. Mr. Juneau, did there ever come a time that
11 Mr. Kenner told you about an investment opportunity in
12 land in the state of Hawaii?

13 A. Yes.

14 Q. Was that when he was now running his own company
15 called Standard Advisors?

16 A. It was around that time, but I can't say for sure.

17 Q. Did there ever come a time that you had agreed to
18 make a loan of some kind to assist in that developed
19 project?

20 A. If I wanted to?

21 Q. Yes.

22 A. No.

23 Q. Okay.

24 Did there come a time that you eventually did
25 make a loan?

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1 A. Yeah, I guess I was told eventually that I was part
2 of it.

3 It was presented to me after I was already in
4 too many other private deals and by that time I was
5 already -- I think it was over \$3.6 million invested in
6 different deals and I had no interest, not that I had in
7 the beginning, but...

8 Q. Well, who convinced you to invest in Hawaii?

9 A. Nobody convinced me 'cause, again, you know, it's --
10 I never wanted to be in these kind of deals.

11 So I ended up --

12 Q. But who talked to you about the deal?

13 A. It was Phil Kenner.

14 Q. Did anybody else other than Mr. Kenner discuss land
15 development in Hawaii at this time, roughly in 2003, when
16 he was over at Standard Advisors?

17 A. No.

18 Q. Did a man by the name of Ken Jowdy propose to you to
19 make a loan to him for the development of property in
20 Hawaii?

21 A. No.

22 Q. What about a man by the name of John Kaiser, you ever
23 hear of a man by the name of John Kaiser?

24 A. Well, in the paper recently, but that was about it.

25 Q. Did there come a time that you -- or do you recall

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1 that there was a line of credit through a bank known as
2 Northern Trust that you had agreed to?

3 A. Something came up, I think it was in sometime in
4 2006, around that time --

5 Q. Well --

6 A. -- asking -- yeah.

7 Q. You are not sure?

8 A. Well, it was around that time and it was about
9 signing for a renewal or whatever it was called for a line
10 of credit.

11 Q. Do you remember when the original line of credit
12 document was signed?

13 A. No.

14 Q. I'm showing you what's been marked for identification
15 as Government Exhibit 2152.

16 Mr. Juneau, would you please look at
17 Government Exhibit No. 2152 and would you turn to the last
18 page.

19 (There was a pause in the proceedings.)

20 BY MR. MISKIEWICZ:

21 Q. Mr. Juneau, any of the signatures on the last page
22 appear to be yours?

23 A. Yeah, the top one is pretty similar to my signature,
24 could be mine.

25 Q. Okay.

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1 What is the date that's indicated there, or
2 maybe it's on the first page?

3 A. There's no date there --

4 Q. The very top?

5 A. December 18, 2003.

6 Q. Was that about the time that you recall first
7 agreeing to open up a line of credit?

8 A. No.

9 Again, I don't, I don't recall opening a line of
10 credit. It's possible I did, but I do not remember
11 that --

12 Q. Okay.

13 A. -- whatsoever.

14 Q. So during this period of time when you were with
15 Mr. Kenner, using Mr. Kenner as your financial advisor,
16 how frequently would you see each other face to face?

17 A. Well, at first kind of often considering that I was
18 pretty busy playing professional hockey and that he was
19 also busy starting up his career in that business.

20 Q. How often is often?

21 Is it once a week? Once a day? Once a month?

22 A. I would say maybe once every three or four months,
23 maybe shorter than that.

24 And, yeah, he would come and visit, you know, as
25 a friend, but as a client, visited me as a client, and at

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1 that time trying to meet some of my teammates as potential
2 clients.

3 Q. You were living in a different city than he was
4 living.

5 Correct?

6 A. Yes.

7 Q. And you were also traveling on the road playing for
8 the NHL for different teams, correct?

9 A. Well, yeah.

10 I played for Boston two years, then went on to
11 play for Washington five years and shortly in Buffalo for
12 three months and then Ottawa one year, Phoenix one year
13 and Montreal for three years.

14 Q. On or about the date that's indicated there, the year
15 anyway, 2003, who were you playing for?

16 A. Montreal.

17 Q. And at about that time were you still social friends
18 with Mr. Kenner?

19 A. Yes.

20 Q. Did you and your family visit him at his house?

21 A. Well, no, we had no time.

22 We did visit him when I retired for
23 Christmastime, it was December 2004.

24 Q. During the time that you were playing and he was your
25 financial advisor, did he ever ask you to sign documents

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1 as part of his work for you as a financial advisor?

2 A. Yeah, at times for sure, yeah.

3 Q. And would you see the whole document or would you see
4 portions of the document?

5 MR. HALEY: Judge, I would object to the leading
6 nature -- I object.

7 THE COURT: Overruled.

8 He can answer.

9 THE WITNESS: Do I answer?

10 THE COURT: Yes.

11 A. Many times it was through a fax, it was seeing only
12 the page that I had to sign.

13 It was very rare that I would get to see an
14 entire document about something that was presented during
15 that period of time.

16 Q. Now, Mr. Juneau, did you ever begin to ask questions
17 about a line of credit or loans to Hawaii that you may
18 have made?

19 In other words, would you ever ask questions
20 specially to Mr. Kenner?

21 A. Well, yeah.

22 I did ask questions.

23 Q. Okay.

24 A. I asked questions about many different deals that I
25 was put in since it's not like I was getting a monthly

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1 paper saying this is what's happening in this place, this
2 place and this place.

3 So...

4 Q. Well, Mr. Juneau, did Mr. Kenner send you any kind of
5 statement of where your investments were on a monthly
6 basis?

7 A. No, no.

8 When I got the information it was mostly through
9 quick e-mails and when we got to see each other spend a
10 little bit of time with each other or spoke on the phones.

11 Q. Did you preserve e-mails that you sent or received
12 from Mr. Kenner during this period of time?

13 A. Yeah.

14 I do it with -- pretty much with everybody that
15 I communicate with.

16 Q. I'm going to show you what's been marked for
17 identification as Government Exhibit 728.

18 (There was a pause in the proceedings.)

19 BY MR. MISKIEWICZ:

20 Q. Showing you what's been marked for identification as
21 Exhibit 728, would you just look at that for a moment,
22 Mr. Juneau.

23 A. Okay.

24 Q. Do you recognize what I just put in front of you?

25 A. Yes, I do.

Juneau - Direct/Miskiewicz

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1 Q. What do you recognize it to be?

2 A. Well, it's an e-mail exchange between Phil Kenner and
3 myself.

4 Q. Is this one of the e-mails that you preserved some
5 period of time ago?

6 A. Yes.

7 MR. MISKIEWICZ: The government offers in
8 evidence Exhibit 728.

9 MR. HALEY: No objection, your Honor.

10 MR. LARUSSO: No objection, your Honor.

11 THE COURT: 728 is admitted.

12 (Whereupon, Government Exhibit 728 was received
13 in evidence, as of this date.)

14 BY MR. MISKIEWICZ:

15 Q. Mr. Juneau, I'm going to zoom in on one part of the
16 exhibit.

17 THE COURT: Is it on your screen in the witness
18 box?

19 THE WITNESS: No.

20 (The above-mentioned exhibit was published to
21 the jury.)

22 BY MR. MISKIEWICZ:

23 Q. Mr. Juneau, I'm going to focus you on the third page
24 of the document.

25 Is this part of your e-mail to Mr. Kenner?

Juneau - Direct/Miskiewicz

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1 A. Yes.

2 Q. Can you explain what you are trying -- what kind of
3 information are you trying to get from him in this e-mail?

4 A. I was trying to find out from all the different
5 investments that he told me I was in.

6 So that was my questions about the Hawaii
7 project which I was informed through a discussion I guess
8 that I was in for \$100,000.

9 Q. And when you say you were informed, as you sit here
10 today, do you remember when Mr. Kenner, or anybody else,
11 told you you were invested in Hawaii?

12 A. It was during the time I was, you know, all the same
13 time, like, I would say between 2002 and 2004 where all
14 these things came about.

15 The Hawaii deal came obviously later and from
16 what I remember, it was presented as many players, or
17 clients going in for a portion of \$100,000.

18 Q. At the top of this screen it says Hawaii and in
19 parentheses it says loan \$100,000.

20 Why did you say \$100,000?

21 A. Well, that was the information that I got from him.

22 Q. When you say him, who are you referring to?

23 A. Oh, Phil Kenner.

24 Q. Anybody else told you about Hawaii?

25 A. No, never.

Juneau - Direct/Miskiewicz

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1 Q. If you look below there's something else there called
2 Scottsdale Airpark.

3 A. Yes.

4 Q. Would you read for the record, you can either do the
5 sheet of paper or read it from the screen, but can you
6 read what you are asking about there.

7 A. What is it worth now? Are we selling or building?

8 Again, I was not getting feedbacks on this
9 investment as well.

10 Q. I think I cut off a little bit of it, but the end of
11 that sentence is, can I get out of it?

12 A. Yeah, well, that's -- I had retired at that time,
13 and, again, found myself in a situation where over \$3.6
14 million was thrown into these different deals and I was
15 not making money anymore at that time.

16 So it was, like, okay. I was told that going
17 into these things would be brief, and that I would get
18 money back pretty quick and it never happened and I was
19 not getting much feedback and I just wanted to get the
20 money back into some investments that we previously had.

21 Q. And when you say you were told that the investments
22 would be pretty brief, who told you that?

23 A. Phil Kenner.

24 Q. By the way, I'll put it up on the screen, the first
25 page of this exhibit, Exhibit 728, just for the record,

Juneau - Direct/Miskiewicz

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1 what is the date of this e-mail exchange with Mr. Kenner?

2 A. It says May 18, 2005.

3 Q. Directing your attention to page two of
4 Government Exhibit 728, there is some text there that is
5 highlighted.

6 MR. MISKIEWICZ: Your Honor, may I read it into
7 the record?

8 THE COURT: Yes.

9 MR. MISKIEWICZ: Hawaii. Your loan is well.
10 The final -- percent sign -- isn't known, but it should be
11 about 1.25 percent of the investment LLC.

12 We haven't done evaluation of the project. We
13 are too busy working on it every day.

14 BY MR. MISKIEWICZ:

15 Q. At this period of time, roughly 2005, is that in
16 answer to what's going on with the \$100,000 that sentence
17 that we had up on the screen earlier?

18 A. Well, that was the response to my questions in the
19 other e-mail, yes.

20 Q. And the Airpark that you had here, the Scottsdale
21 Airpark, was that also known as Avalon or do you know?

22 A. I guess, yes.

23 I think it was the same thing.

24 Q. Okay.

25 MR. MISKIEWICZ: I'll read into the record what

Juneau - Direct/Miskiewicz

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1 it says right above that.

2 It says Avalon period. We are beginning the new
3 permit process and beginning construction shortly. I'll
4 work to get your initial money back -- three dollar signs
5 in a row -- back if that's what you want, no specific
6 timeline.

7 Q. Was that the sum and substance of the response that
8 you got from Mr. Kenner?

9 A. Yes.

10 Q. This Scottsdale Airpark and/or Avalon, what if
11 anything were you told about an Airpark or Avalon at this
12 time?

13 In other words, what was the investment about?

14 A. Yeah, it was about something building hangars at
15 Scottsdale airport and, again, something that I would get
16 my money back very fast.

17 MR. LARUSSO: Your Honor, I apologize.

18 May I just make sure who is telling him or
19 giving him this advice? I don't believe that was part of
20 the question.

21 THE COURT: Who are you speaking about, who is
22 telling you this?

23 THE WITNESS: Phil Kenner.

24 BY MR. MISKIEWICZ:

25 Q. Did he tell you who was in charge of this Avalon or

Juneau - Direct/Miskiewicz

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1 Scottsdale Airpark project?

2 A. Yeah.

3 Q. Who?

4 A. The name of Tommy Constantine was said to me for the
5 first time.

6 Q. Had you ever met Mr. Constantine prior to this
7 investment?

8 A. No.

9 Q. Anybody other than Mr. Kenner tell you about an
10 Airpark project?

11 A. No.

12 Q. Okay.

13 A. Actually, by that e-mail, not when I invested, by the
14 way, but at the date of that e-mail I had one day met
15 Tommy Constantine.

16 Q. Okay.

17 The date of the e-mail is?

18 A. The e-mail is May 18th, but that's a few years after
19 that investment.

20 But when the investment came about, I recall
21 having met Tommy Constantine at that time.

22 Q. Who introduced you to Tommy Constantine, and was that
23 his name?

24 He went by the name of Tommy, he didn't use Tom?

25 A. That's the name.

Juneau - Direct/Miskiewicz

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1 Q. Who introduced you to Tommy Constantine?

2 A. Phil, Phil Kenner.

3 Q. Do you remember approximately when did you invest in
4 this Airpark project that Mr. Constantine was running?

5 A. Again, approximately -- it had to be between 2002 and
6 2004.

7 Q. Okay.

8 Do you remember approximately how much you
9 invested?

10 A. Half a million.

11 Q. Is that what you say in your e-mail, at least
12 listing -- showing you page three of Exhibit 728, was that
13 your knowledge or recollection at that time in 2005 that
14 you had \$500,000 invested in Scottsdale Airpark?

15 A. Yes.

16 Q. Okay.

17 Now, when you were solicited to invest half a
18 million dollars in the Scottsdale Airpark, for how long
19 was that investment supposed to take place?

20 A. I can't say if it was a week, month, year.

21 Like, it was -- I know it was something short.

22 Q. Were you investing in a company or were you making a
23 loan?

24 A. I can't answer that.

25 I believe it was a company, but it was possibly

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1 something else.

2 Q. Did Mr. Kenner produce for you an agreement that laid
3 out what the terms of this \$500,000 investment would be?

4 A. I don't remember seeing any paperwork or much
5 paperwork.

6 I remember at one point seeing sketches, but
7 it's very vague.

8 Q. You mean drawings of the Airpark?

9 A. Of -- yeah, the landing strip and the hangars or
10 whatever.

11 Q. Did there come a time that you were asked to --

12 MR. MISKIEWICZ: Withdrawn.

13 BY MR. MISKIEWICZ:

14 Q. Let's stay in 2005.

15 Did there ever come a time after getting -- we
16 just saw those answers -- that you decided to seek through
17 the advice of some other financial consultant or tax
18 consultant or advisor?

19 A. At one point, yes, when I started believing that this
20 was getting nowhere, yeah, I did started to look
21 elsewhere, find someone that would help, advise me.

22 Q. Does the name or the word fiscalist,
23 F-I-S-C-A-L-I-S-T, fiscalist, does that have any
24 particular meaning in Canada?

25 A. Yeah, it does.

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1 It's a specialized accountant, if I can say.

2 Q. Okay.

3 A. It's someone that I had confidence in.

4 Q. Did you at some point indicate to Mr. Kenner that you
5 were going to attempt to get advice from such an
6 accountant?

7 A. I believe I did at one point, yeah.

8 Q. How did you communicate that to him?

9 A. It was only by e-mail.

10 It became impossible to speak, to meet. So it
11 was always e-mails.

12 Q. I'm going to show you what's been marked for
13 identification as Government Exhibit 729.

14 (There was a pause in the proceedings.)

15 BY MR. MISKIEWICZ:

16 Q. Mr. Juneau, showing you 729, do you recognize that
17 document?

18 A. Yes.

19 Q. What do you recognize it to be?

20 A. Well, it's -- that was the e-mail that I had sent
21 Phil Kenner, trying to get some update, and letting him
22 know that I was seeking professional advising from someone
23 in respect to what I had remaining in this.

24 Q. And you preserved that e-mail?

25 A. Yes, like pretty much all the e-mails.

Juneau - Voir Dire/Haley

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1 MR. MISKIEWICZ: The government moves for the
2 admission of 729.

3 MR. HALEY: Your Honor, may I conduct a brief
4 voir dire?

5 THE COURT: Sure.

6 MR. HALEY: Thank you.

7 THE COURT: Let me explain to the jury what that
8 means.

9 If a party is seeking to offer a document into
10 evidence and the lawyer has some questions that relates to
11 the document itself before stating whether he objects or
12 not, he can interrupt the direct examination and just ask
13 some questions about the document.

14 Go ahead, Mr. Haley.

15 MR. HALEY: Thank you, Judge.

16 VOIR DIRE EXAMINATION

17 BY MR. HALEY:

18 Q. Mr. Juneau, good afternoon, sir.

19 A. Good afternoon.

20 Q. My name is Rick Haley. I represent Phil Kenner.

21 When you answered that last question by the
22 government with respect to you preserved these e-mails, I
23 believe your answer was pretty much so.

24 Is that correct? How did you preserve these
25 e-mails, sir?

Juneau - Voir Dire/Haley

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1 A. They are just with the software that I use, pretty
2 much all my e-mails are always saved.

3 Some e-mails that I would just drag onto
4 different files that I would create, just so I could find
5 myself more easily over time.

6 Q. Well, with respect to that particular e-mail that you
7 are looking at now, when was the last time you saw that
8 particular e-mail before today?

9 A. I received a bunch of e-mails about a couple of weeks
10 ago, and those were e-mails that couple years ago were
11 sent in a different case.

12 And that's -- so I have been looking at this a
13 couple times in the past two weeks.

14 Q. Who sent you those e-mails, sir?

15 A. I received this from I believe FBI people.

16 Q. Well, before the FBI people sent you that e-mail,
17 when was the last time you saw that particular e-mail?

18 A. At the other case which was, it was -- actually it
19 was when I did personal procedures, I don't know how you
20 call them, where I took a bunch of e-mails and sent it to
21 a lawyer.

22 Q. And how long ago was that?

23 A. I think it was in 2008, 2009, something like that.

24 Q. Sir, do you know for a fact, as you sit here today,
25 that that particular e-mail that you are looking at now

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1 was part of the package of e-mails you sent to this
2 lawyer?

3 Yes or no?

4 A. Well, I sent this e-mail to the other lawyer, so it's
5 possible that -- this e-mail was sent to my lawyer back in
6 whatever time it was.

7 Q. And his or her name?

8 A. What's that?

9 Q. His or her name of the lawyer?

10 A. The lawyer is Michael Meeks.

11 Q. Was Michael Meeks, if you know --

12 MR. HALEY: Judge, I apologize.

13 I'm going to withdraw my objection.

14 THE COURT: Okay.

15 Any objection, Mr. LaRusso?

16 MR. LARUSSO: No, your Honor.

17 THE COURT: 729 is admitted.

18 (Whereupon, Government Exhibit 729 was received
19 in evidence, as of this date.)

20 DIRECT EXAMINATION

21 BY MR. MISKIEWICZ:

22 Q. Mr. Juneau, could you read the bottom portion of that
23 document, specifically your portion.

24 What are you writing to Mr. Kenner at this time?

25 A. Well, where are you at these days? Give me a buzz as

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1 soon as you can. I will probably hire a fiscalist to look
2 over all my stuff and maximize my wealth.

3 I'd like to talk to you about it.

4 Q. Okay.

5 And above that, is that the defendant's response
6 to you?

7 A. Looks like it.

8 MR. MISKIEWICZ: Again, may I read it into the
9 record, your Honor?

10 THE COURT: Yes.

11 BY MR. MISKIEWICZ:

12 Q. First of all, where it begins Joe, is that Mr. Kenner
13 writing back to you?

14 A. Yes.

15 MR. MISKIEWICZ: I'm not sure what a fiscalist
16 is, but I have a good guess. Remember that I spent three
17 years at RPI. Don't ask my opinion about it.

18 I will suggest that if you think there is anyone
19 on this planet that could put more money or energy --

20 THE COURT: You misread it.

21 MR. HALEY: Yes.

22 MR. MISKIEWICZ: I'll do it again.

23 MR. HALEY: Your Honor, may we not have the
24 inflection?

25 I have no objection.

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1 THE COURT: Yes.

2 MR. HALEY: The emphasis is obvious.

3 THE COURT: Just read it in a neutral tone,
4 please.

5 MR. HALEY: Thank you, sir.

6 MR. MISKIEWICZ: I will suggest that if you
7 think there is anyone on this planet that could put more
8 energy or interest into maximizing your wealth through
9 cutting edge market strategies and creative property --
10 private opportunities, you should tell me now.

11 I am the most talented person you will find
12 anywhere. So if you think there is another person who can
13 do it better, let me know ASAP, so I can stop caring about
14 your family and your -- expletive. I am not -- expletive
15 -- kidding, either. That comment is the ultimate insult
16 to me after 18 years.

17 Think about it and let me know.

18 BY MR. MISKIEWICZ:

19 Q. When you received that e-mail, what if anything did
20 you decide to do with respect to your business
21 relationship and advisory relationship with the defendant?

22 A. I didn't decide anything.

23 After reading this I was stunned, obviously.

24 Again, what I wanted was to have a discussion with

25 Phil Kenner and discuss my best interest in terms of what

Juneau - Direct/Miskiewicz

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1 I had left.

2 Q. Did you continue to try to get answers about where
3 your investments were?

4 A. With this date --

5 Q. Well, after the date?

6 A. Yeah, we were not talking.

7 I was trying to connect through phones, phone
8 calls and we never got to talk again after that.

9 Q. Did there ever come a time that you received
10 documents asking you to sign for a renewal on a line of
11 credit?

12 A. Yeah.

13 Q. Do you remember approximately what year was that?

14 A. It was after that.

15 MR. MISKIEWICZ: May I approach?

16 THE COURT: Yes.

17 BY MR. MISKIEWICZ:

18 Q. Showing you Government Exhibit 730 for
19 identification.

20 (There was a pause in the proceedings.)

21 BY MR. MISKIEWICZ:

22 Q. Mr. Juneau, I'm showing you this document, if you
23 would look at it for a moment and let me know, do you
24 recognize that document?

25 A. That's another e-mail that I had sent to my former

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1 attorney.

2 Q. I know Mr. Haley asked you about another attorney.

3 I'm asking you, did you send that e-mail and did
4 you get that reply on or about the date that's on the
5 e-mail?

6 A. Well, yeah.

7 I have these e-mails in my computer.

8 Q. Those are your e-mails?

9 A. Yes.

10 Q. You save them?

11 A. Yes.

12 MR. MISKIEWICZ: The government moves for the
13 admission of Exhibit 730.

14 MR. HALEY: Brief voir dire, Judge.

15 My only question is this.

16 VOIR DIRE EXAMINATION

17 BY MR. HALEY:

18 Q. Is that one of the e-mails you recently received from
19 the FBI as well?

20 A. I believe so.

21 Q. Thank you.

22 MR. HALEY: No further questions.

23 THE COURT: Any objection?

24 MR. HALEY: No, sir.

25 MR. LARUSSO: No, your Honor.

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1 THE COURT: 730 is admitted.

2 (Whereupon, Government Exhibit 730 was received
3 in evidence, as of this date.)

4 DIRECT EXAMINATION

5 BY MR. MISKIEWICZ:

6 Q. Is it fair to say that the e-mails back and forth
7 begin at the bottom and go to the top, the e-mail string?

8 A. Um-hmm.

9 Q. Is this about the time that you were asked to sign
10 documents to renew a line of credit?

11 A. Yeah.

12 Q. And what is the date?

13 A. June 6th is when I wrote to Phil Kenner about this
14 letter.

15 Q. In your own words, what were you trying to find out
16 from Mr. Kenner?

17 A. Well, where are you?

18 I need to get -- so this is what he wrote to
19 me -- I need to get the Northern Trust line of credit docs
20 for me to resign.

21 And a few days later explaining to me that there
22 was the renewal for the old LOC, line of credit.

23 Q. Had you gotten something in the mail either from him
24 or from Northern Trust that was some sort of a renewal of
25 a line of credit?

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1 A. I don't believe then.

2 I did at one point receive a letter from

3 Northern Trust, but --

4 Q. Well, did you --

5 MR. MISKIEWICZ: Withdrawn.

6 BY MR. MISKIEWICZ:

7 Q. With respect to this particular e-mail where you say,
8 what is this anyway, NT LOC doc resigned, give me a buzz.

9 What are you referring to when you say that?

10 A. Well, I was wondering what it was.

11 Q. Did you get something in the mail or somehow in an
12 e-mail?

13 A. I can't say.

14 I guess I did, or it's something that he sent by
15 e-mail. I'm not too sure.

16 Q. Okay.

17 A. But it's obviously something that I did receive and I
18 did not understand.

19 Q. Now, I show you another e-mail, Government Exhibit
20 732.

21 (There was a pause in the proceedings.)

22 BY MR. MISKIEWICZ:

23 Q. Mr. Juneau, looking at Government Exhibit 732, do you
24 recognize that document?

25 A. Well, that's another e-mail that I had saved.

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1 Q. Is this an e-mail that you received -- or an e-mail
2 you sent or received from and to Mr. Kenner?

3 A. Yes, it looks like an exchange between the both of
4 us.

5 MR. MISKIEWICZ: The government moves for the
6 admission of 732.

7 MR. HALEY: No objection, your Honor.

8 MR. LARUSSO: No objection, your Honor.

9 THE COURT: 732 is admitted.

10 (Whereupon, Government Exhibit 732 was received
11 in evidence, as of this date.)

12 BY MR. MISKIEWICZ:

13 Q. Mr. Juneau, could you just read your portion, what
14 are you asking Mr. Kenner at this stage?

15 A. Phil, I just got the documents. What is this
16 \$750,000 extended credit amount?

17 I'm not borrowing that amount I hope. Who else
18 is in there with us? Why is there two of the same exact
19 document to sign?

20 I don't understand this whole deal. What am I
21 signing here? What do I get? What do I have already? We
22 need to talk. I need to fully understand this.

23 Q. Would you look at the top and read into the record
24 what was Mr. Kenner's response to you?

25 A. These are the renewal docs for the LOC that just

Juneau - Direct/Miskiewicz

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1 expired recently.

2 You, Owen and I are signed on this LOC. Most of
3 it will be going away in the next few weeks as I finish
4 the development banking deal. I am not sure why there are
5 two of the same document.

6 That is the signature package for you from the
7 bank. I have the same package for Owen and I. You
8 already have approximately 3 percent of the investment
9 LLC, Little Isle IV, LLC, in the Hawaii deal. This is for
10 your participation through the LOC you have endorsed.

11 Q. And it ends PK?

12 A. PK, yeah.

13 Q. Those are Phil Kenner's initials?

14 A. Yes.

15 Q. Did he frequently end the e-mails like that?

16 A. Well, I can't remember.

17 Q. Okay.

18 A. If he signed Phil or PK, but...

19 Q. Okay.

20 Is this a continuation of your earlier
21 conversation starting June 9th of '06, turning your
22 attention back to Government Exhibit 730?

23 A. Yeah.

24 It seemed like it's a follow up on that.

25 Q. Okay.

Juneau - Direct/Miskiewicz

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1 By the way, what you just read into the record,
2 Mr. Kenner's explanation to you, did any of that make any
3 sense to you?

4 A. No.

5 I can't say that.

6 Q. When he said to you, you have approximately 3 percent
7 of the investment LLC, Little Isle IV, LLC, what's he
8 talking about?

9 A. 3 percent of the -- I don't know, the Hawaii deal
10 that he had told me about.

11 Q. Did you ever see a contract, a document, a loan
12 agreement, something that set forth what your percentage
13 ownership was in the Hawaii deal?

14 A. I don't recall.

15 It's possible.

16 Q. One other question.

17 The LOC, the line of credit, what if anything
18 did that have to do with the Hawaii deal as far as what
19 Mr. Kenner told you?

20 A. I had no knowledge of line of credit, to be honest.

21 So -- anyway, all of this, when I received this
22 obviously by my questioning was pretty obvious.

23 Q. Showing you Government Exhibit 733.

24 Mr. Juneau, if you would please, again, look at
25 733.

Juneau - Voir Dire/Haley

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1 (There was a pause in the proceedings.)

2 BY MR. MISKIEWICZ:

3 Q. Is that another e-mail that you preserved?

4 A. Yes.

5 Q. Is that an e-mail or an exchange of e-mails that you
6 sent or received from Mr. Kenner?

7 A. Yeah, it looks like it.

8 MR. MISKIEWICZ: The government --

9 BY MR. MISKIEWICZ:

10 Q. Well, are you sure?

11 A. Hmm?

12 Q. Are you sure, or is there any doubt in your mind that
13 this is your e-mail?

14 A. No, there is no doubt.

15 MR. MISKIEWICZ: The government moves for the
16 admission of Exhibit 733.

17 MR. HALEY: Brief voir dire, Judge.

18 THE COURT: Go ahead.

19 MR. HALEY: Thank you.

20 VOIR DIRE EXAMINATION

21 BY MR. HALEY:

22 Q. Mr. Juneau, these e-mails that you are identifying as
23 being e-mails between yourself and Phil Kenner, are they
24 in sequence or are certain e-mails being skipped, like
25 there's e-mails between these various dates?

Juneau - Direct/Miskiewicz

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1 A. It's possible, but it seems like it's in the
2 sequence, the bottom one is the question.

3 Q. Well, do you know if the FBI sent you --

4 MR. HALEY: Withdrawn.

5 BY MR. HALEY:

6 Q. Is that one of the e-mails that the FBI sent you?

7 A. I think so.

8 Q. And it's your testimony as you sit here today, you
9 can't say one way or another whether there was an
10 e-mail -- whether this is a complete sequence?

11 In other words, whether it's complete or whether
12 some e-mails are missing, is that true?

13 A. It's possible that there is more exchange.

14 But, again, I'd have to look.

15 Q. It's been a while.

16 MR. HALEY: Thank you, your Honor.

17 I have no objection.

18 THE COURT: Mr. LaRusso?

19 MR. LARUSSO: No objection, your Honor.

20 THE COURT: 733 is admitted.

21 (Whereupon, Government Exhibit 733 was received
22 in evidence, as of this date.)

23 DIRECT EXAMINATION

24 BY MR. MISKIEWICZ:

25 Q. For the record, Mr. Juneau, would you again, reading

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1 from the bottom to the top, would you read into the record
2 what are you asking Mr. Kenner at this stage?

3 A. Can you tell me why it says \$750,000 in the contract?
4 Didn't I initially sign for \$100,000?

5 Is 3 percent of the investment in Little Isle
6 IV, LLC, also 3 percent in the whole Hawaii deal?

7 Q. Would you read what Mr. Kenner responded to you?

8 A. It says the \$750,000 is the same as the original doc
9 you, Owen and I signed for.

10 The 100K is the cash you were supposed to also
11 put in the deal but you never did. I didn't bother you
12 for it, even though every other investor had to invest the
13 cash in the deal, even with the LOC signatures.

14 The investment is 3 percent in the Little Isle
15 IV. The whole Hawaii deal is worth, appraised land,
16 approximately \$90 million -- 90M, I guess \$90 million
17 right now.

18 (Continued on next page.)

19

20

21

22

23

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25

Juneau - Direct/Miskiewicz

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1 BY MR. MISKIEWICZ:

2 Q. And turning your attention back to Government Exhibit
3 728 in evidence, the e-mail dated May 15, 2005, this is
4 the one you testified about several minutes ago about your
5 hundred thousand dollar loan, do you recall that? Do you
6 have that in front of you?

7 A. Yep.

8 Q. You made a hundred thousand dollar loan and you were
9 asking questions about it in 2005, do you remember?

10 A. Yes.

11 Q. And what did Mr. Kenner tell you then about your
12 hundred thousand dollars?

13 A. Well, it's Hawaii your loan as well the final
14 percentage is unknown but it should be about 1, 125
15 percent of the investment in LLC, we haven't gotten on the
16 project, we are too busy working on it every day.

17 Q. When he writes this to you in June of 2006, 750 is
18 the same as the original doc, you Owen and I signed for
19 100K is the cash that you were also supposed to put in the
20 deal what's he talking about?

21 A. That's what I didn't understand, I guess.

22 Q. Does it make any sense to you?

23 A. It didn't. It still -- well, today, yeah. It did.

24 Q. Mr. Juneau, I'm going to show you what's been marked
25 for identification as Government Exhibit 2155.

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1 Mr. Juneau, showing you exhibit 2155 there's a signature
2 on that document. Is that your signature? (Handing.)

3 A. Yeah, it looks like it.

4 MR. MISKIEWICZ: Government moves for the
5 admission of 2155.

6 MR. HALEY: No objection.

7 MR. LA RUSSO: No objection, your Honor.

8 THE COURT: 2155 is admitted.

9 (Government's Exhibit 2155 in evidence.)

10 Q. Mr. Juneau, I'm just going to put it up on the
11 screen. Mr. Juneau, I'm showing you 2155 now in evidence.
12 That's your signature, correct?

13 A. Yep.

14 Q. This is a statement regarding Northern Trust Bank,
15 correct?

16 A. Yep.

17 Q. And there's a middle section here that indicates part
18 one, to be completed by the borrower or borrowers, do you
19 see that?

20 A. Yeah.

21 Q. The question number one says what is the amount of
22 the credit being extended. Do you see that?

23 A. Um-hmm, yep.

24 Q. Immediately thereafter there's a handwritten note of
25 \$500,000. Do you see that?

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1 A. Yes.

2 Q. Is that your handwriting?

3 A. No.

4 Q. Did you recognize the handwriting?

5 A. Not sure, no. Not sure.

6 Q. Do you see there is two lines down it says if the
7 answer is no, describe the specific purpose of the credit.
8 Do you see that?

9 A. Yes.

10 Q. What does it say?

11 A. Real estate investment.

12 Q. Is that your handwriting?

13 A. No.

14 Q. Mr. Juneau, did Mr. Kenner ever tell you that you
15 were putting in \$500,000 into the Hawaiian deal?

16 A. No. Never.

17 Q. When you signed this document, did you go over how
18 much was being extended as part of this line of credit
19 with Mr. Kenner?

20 A. I believe when I received this, you know, there was
21 something I received and I was asking a lot of questions
22 and some of the questions was about \$750,000.

23 Q. Well, but in 2005, when you were asking what happened
24 to your loan, in Hawaii what was the number that you
25 understood you had invested?

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1 A. 100,000.

2 Q. Do you have any idea how that went from a hundred
3 thousand to 500,000?

4 A. Obviously not.

5 Q. Did you authorize Mr. Kenner to invest that amount of
6 money in Hawaii in your name?

7 A. No.

8 Q. Or borrow that amount of money?

9 A. No.

10 Q. Did you know it was happening when it happened?

11 A. No. No. Obviously no.

12 Q. Did you receive from Mr. Kenner any documents
13 indicating that this was happening when it happened?

14 MR. HALEY: Judge, I have to object to the
15 leading nature of it. What, if anything, did you receive.
16 It's a series of leading questions from the government's
17 own witness.

18 THE COURT: The document's admissible.
19 Overruled. That's permissible. You can answer that.

20 A. Can you ask it again, please.

21 Q. Did you receive any documents at this time telling
22 you the moment money was borrowed if it was borrowed
23 advising you that that happened?

24 A. I don't remember receiving such letters.

25 Q. Show you what has been mashed as Government's Exhibit

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1 2158.

2 MR. MISKIEWICZ: Your Honor, we have a
3 stipulation among the parties regarding this particular
4 document. Do you wish me to read the entire stipulation
5 into the record, it's rather lengthy, or I can proffer
6 that the parties agree to stipulate this is a business
7 record.

8 MR. HALEY: Judge, I so stipulate.

9 MR. LA RUSSO: Likewise, your Honor.

10 THE COURT: I just need the parties to agree
11 that this is a business record and there's no objection to
12 it coming into evidence. I'll see what weight should be
13 given to the exhibit. It's always up to the jury. Okay.
14 So with that stipulation you're offering 2158.

15 MR. MISKIEWICZ: Yes, your Honor.

16 THE COURT: That is admitted.

17 (Government's Exhibit 2158 in evidence.)

18 Q. Mr. Juneau, just first of all, it's fair to say you
19 have never seen this or this is not a document that you
20 received?

21 A. No. I don't think so, no.

22 Q. Can you look at the line that's dated December 19,
23 2003.

24 A. Yeah. December 19, '03.

25 Q. Does it indicate how much is being transferred or

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1 wired to a company at that point?

2 A. Here it says 500,000.

3 Q. Okay. Thank you. Also show you, Mr. Juneau,
4 Government Exhibit 2157?

5 MR. MISKIEWICZ: Your Honor, this is a document
6 I proffer is also covered by stipulation between the
7 government and counsel and we would offer it now into
8 evidence as Government Exhibits 2157.

9 MR. HALEY: That's correct, Judge, we do
10 stipulate.

11 MR. LA RUSSO: Stipulate, your Honor.

12 THE COURT: 2157 is admitted.

13 (Government's Exhibit 2157 in evidence.)

14 Q. Mr. Juneau, looking at Government's Exhibit 2157,
15 again at or about the time that the e-mails were, you
16 testified earlier, 2005, 2006, did you ever receive a
17 statement like that?

18 A. I don't think I ever seen this document before.

19 Q. On the upper left-hand corner there's the name of the
20 account is something called Little Isle IV, do you see
21 that?

22 A. Yes, I do.

23 Q. Do you know what Little Isle IV was?

24 A. Well, from what you're looking at and what you told
25 me.

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1 Q. What was it?

2 A. It was related to land purchased in Hawaii.

3 Q. But did he ever show you that document?

4 MR. HALEY: Object, your Honor.

5 THE COURT: Sustained. Asked and answered.

6 MR. HALEY: Thank you.

7 MR. MISKIEWICZ: Your Honor, I'm about to move
8 to a different area.

9 THE COURT: Okay. It's 4:27 so we'll stop for
10 the day. We'll reconvene tomorrow morning at 9:30. Don't
11 discuss the case. Don't read anything or listen to
12 anything related to the case. Have a good, safe trip
13 home. See you tomorrow morning at 9:30.

14 (Whereupon, the jury retired from the
15 courtroom.)

16 THE COURT: You can step down, Mr. Juneau.
17 Thank you. Everyone can be seated.

18 Mr. La Russo, I have reviewed those e-mails with
19 regard to this issue regarding the newspaper article, the
20 Post. Let me ask the government this. First of all, my
21 ruling is with respect to the victims that are going to
22 testify and have some testimony related to
23 Mr. Constantine's self-disclosing his prior conviction
24 and/or his use of a prior name, I'm precluding that. My
25 understanding is the government is offering that to allow

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1 the witness to help explain how the relationship of trust
2 developed with respect to Mr. Constantine. However, I
3 believe there will be a sufficient basis for him to
4 describe how the relationship began, what induced them to
5 rely on anything Mr. Constantine was saying independent of
6 any purported reliance on the fact that I told them he had
7 a prior conviction and he was turning his life around.

8 I believe that any probative value that would
9 have with respect to explaining the nature of the
10 relationship is substantially outweighed by a danger of
11 unfair prejudice for that fact to come out.

12 However, with respect to the second issue, my
13 question to the government -- I'll hear from Mr. La Russo
14 as to whether he has any objection to this -- to the
15 extent the government needs this Page Six to come out for
16 the witness to explain at least in part Mr. Constantine
17 was asking him to rehabilitate his image with respect to
18 this article, why the witness can't just testify, the
19 defense would open the door to further questions on it,
20 the first question is there was a negative article of Page
21 Six on the New York Post about Mr. Constantine and he
22 asked me to, whatever it is, develop plan to address that
23 or address his image, but why can't the article just be
24 referenced as a negative article about Mr. Constantine. I
25 don't think it's important to explain what precisely was

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1 negative about it. What's wrong with that?

2 MS. KOMATIREDDY: I think we can tell the
3 witnesses to discuss it more generally, your Honor. I
4 want to advise the Court, I think what we'll elicit is
5 this is a negative article about a personal matter -- the
6 reason that I say that is because the each of the
7 witnesses will say that he was given this article and
8 asked to respond to it in addition to also being asked to
9 do work for the hockey players, and there's a need for us
10 to distinguish between work done in the interest of the
11 hockey players and work done for Mr. Constantine
12 personally.

13 So if I may ask that we be permitted to elicit
14 testimony about a negative article about a personal
15 matter, something like that.

16 THE COURT: I'll work on the phraseology.
17 Mr. La Russo.

18 MR. LA RUSSO: I'm sorry your Honor.

19 THE COURT: I said I want to come up with some
20 phraseology that's acceptable to both sides. So the
21 government is suggesting the witness would say there is a
22 negative article on a personal matter.

23 MS. KOMATIREDDY: Yes, a personal matter
24 unrelated to the victim's investments. It's the central
25 point that we're trying to get across.

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1 MR. LA RUSSO: Your Honor, as Mr. Constantine
2 just reminded me, the whole purpose of this use by the
3 government is to show that this particular article was
4 directly related to his personal use. They're trying to
5 show that the monies that were taken out of the global
6 settlement fund were used for his personal benefit. And
7 as I tried to relate to all the e-mails that I showed you
8 that's not the case, that the monies that were spent with
9 regard to publicity was not really addressing a personal
10 issue.

11 I don't have any objection to characterizing it
12 as the Court indicated, but putting the word personal in
13 it you're directing now towards monies that are directly
14 going towards his person, which would be outside the
15 global settlement fund.

16 THE COURT: I know. But whether or not he had
17 conversations about other things that he wanted them do is
18 independent of the fact that apparently the witness is
19 going to testify that one of the things that he's going to
20 is this -- the government wants to elicit, am I accurate
21 that that's what the witness is going to say?

22 MS. KOMATIREDDY: Yes, your Honor.

23 THE COURT: So the fact that they may be another
24 thing Mr. Constantine is asking, is something that the
25 government should be able to elicit that from the witness.

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1 MR. LA RUSSO: I understand, Judge, I think
2 there may be a factual difference here. I think the
3 article that the witness is alluding to is a different
4 article other than this one. And what I would suggest we
5 do, obviously I see with the Court is going, I understand
6 government's position, if the witness does say that in
7 fact this was being specifically addressed, then maybe my
8 argument would not be as strong.

9 So what I would suggest before we get into this,
10 can we have a proffer from the witness as to exactly what
11 this is so that we can address it better. My
12 understanding is we're talking about an a different
13 article.

14 MS. KOMATIREDDY: Your Honor, I can proffer to
15 the Court that in preparing HL group's witness in this
16 matter, we specifically identified the article marked as
17 3309, and the article that Mr. Constantine provided to him
18 when he was retained for public relation services and
19 asked to respond to.

20 THE COURT: So in light of that proffer,
21 Mr. La Russo, the way I would handle it, Mr. La Russo, if
22 you want, if you believe there may be some mistake by the
23 witness regarding that, I will have the government mark
24 the article as an exhibit, show it to the witness, without
25 referencing what it is, to establish that is in fact

1 article whatever agreement on the language we agree to,
2 I'll let the government lead the witness, is that, in
3 effect an article, a negative article about a personal
4 matter on Mr. Constantine and the witness will answer yes
5 or no. If you want the government will mark the exhibit,
6 show it to the witness, but they're fairly confident that
7 this is the article.

8 MR. LA RUSSO: I think that's a fair solution,
9 Judge.

10 THE COURT: So you can talk with the government,
11 what the exact phrasing will be, but that seems to be a
12 reasonable compromise to me. Okay.

13 MR. LA RUSSO: Thank you, Judge.

14 THE COURT: Have a good night.

15 MR. MISKIEWICZ: One last thing. I want to put
16 on the record, Mr. La Russo asked for a copy or what the
17 sum total government's evidence is regarding the IRS being
18 contacted. I have provided him the one article that we
19 have. And that is the sum total of what we have.

20 THE COURT: Mr. Haley.

21 MR. HALEY: I'm returning to my office now, I
22 don't know the answer to that.

23 THE COURT: Just remind me in the morning you
24 still haven't heard. Okay. Have a good night.

25 MR. LA RUSSO: Good night.

1 MR. MISKIEWICZ: Good night, your Honor.

2 MR. HALEY: Good night.

3 (Whereupon, court recessed for the day in this
4 matter at 4:40 p.m. until Tuesday, April 5, 2015 at 9:30
5 a.m.)
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